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No. 67, Original

In The Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF IDAHO EX REL. CECIL D. ANDRUS,
GOVERNOR, ET AL., PLAINTIFF

v.

STATE OF OREGON
AND STATE OF WASHINGTON, DEFENDANTS

REPORT AND SUPPLEMENTAL REPORT OF SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

Jean S. Breitenstein

Special Master
United States Courthouse
Denver, Colorado 80294

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DECISION OF SPECIAL MASTER ON AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

FOR THE STATE OF IDAHO
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FOR THE STATE OF WASHINGTON
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Edward B. Mackie, Deputy Attorney General

SUMMARY OF REPORT OF SPECIAL MASTER

The affirmative defenses of Oregon and Washington, and the Special Master's conclusion on each, are:

1 - **Bar of a pending federal district court case.**

Sohappy v. Smith, a case which relates to the anadromous fishery of the Columbia River System and to which the United States, Oregon, Washington and four Indian tribes, but not Idaho, are parties, is pending in the federal district court for the District of Oregon. The pendency of that suit is no bar to this action because Idaho has properly invoked the original and exclusive jurisdiction of the Supreme Court over a suit between States.

2 - **Sufficiency of the complaint.**

The Idaho complaint alleges that Oregon and Washington have deprived Idaho of its equitable share of the anadromous fishery of the System. A justiciable controversy is presented.

3 - **Nonjoinder of an indispensible party.**

The United States is the trustee of four Indian tribes which have treaty-protected fishing rights in the System. The United States has constructed, operates, and controls various facilities in the System which affect both the downstream and upstream passage of fish. The United States has not consented to suit. The rights and interests of the parties to this case, and of the United States, are so intertwined and related that it will be impossible to fashion a decree which will provide an adequate remedy. Hence, the action should not proceed.

Reccommendation.

The Special Master recommends that the action be dismissed because the United States is an indispensable party and cannot be joined without its consent.

I - BACKGROUND

The State of Idaho brought this original suit against the States of Oregon and Washington. In granting leave to file, the Court limited the issue to the equitable apportionment of

the upriver anadromous fishery of the Columbia River Basin, and left open the questions of (1) whether the complaint states a claim on which relief may be granted, and (2) whether the United States is an indispensable party. Idaho v. Oregon, 429 U.S. 163. The Court appointed a Special Master. Idaho v. Oregon, 431 U.S. 952. The answers of Oregon and Washington raised affirmative defenses on which evidence has been taken and arguments received. This report of the Special Master contains his conclusions and recommendations on the affirmative defenses.

The Columbia River flows from the mountains of Idaho through a portion of the Canadian province of British Columbia and then across the State of Washington. It becomes the boundary between Washington and Oregon for approximately 270 miles before entering the Pacific Ocean. The Snake River, a principal tributary of the Columbia, rises in Wyoming, flows across Idaho, becomes the boundary between Idaho and Oregon for approximately 165 miles, the boundary between Idaho and Washington for approximately 30 miles, enters Washington, and flows about 100 miles across Washington to its confluence with the Columbia.

The Columbia River System supports various species of anadromous fish. There are many kinds of anadromous fish. This suit is primarily concerned with spring and summer Chinook Salmon and with Steelhead Trout.

Controversy over the anadromous fishery of the Columbia River System has been going on for years. In 1855 the United States entered into a series of treaties with the Indian tribes of Oregon and Washington, including: (1) Yakima, 12 Stat. 951; (2) Tribes of Middle Oregon, 12 Stat. 963; (3) Umatilla, 12 Stat. 945; and (4) Nez Perce, 12 Stat. 957. The treaties recognize the right of the Indians to fish and have resulted in extensive litigation. See e.g. Sohappy v. Smith, D.C.Ore., 302 F.Supp. 899, affirmed and remanded, 9 Cir., 529 F.2d 570; United States v. Washington, 9 Cir., 520 F.2d 676, cert. denied 423 U.S. 1086; and Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44. Sohappy v. Smith is pending on a five-year agreement made by the United States, Oregon, Washington,

and the four Indian Tribes for the management of the Columbia River fishery. Idaho was not a party to the agreement.

In 1918, with the consent of Congress, Oregon and Washington entered into the Oregon-Washington Columbia River Fish Compact. 40 Stat. 515. In substance the compact provides that the then existing laws and regulations of each State pertaining to Columbia River fish should not be changed, altered, and amended without the consent and approval of both States. Idaho was not a party to the compact and its efforts to become a party have failed. In its complaint Idaho charges that the operation of the compact has adversely affected the number of anadromous fish available for harvest in Idaho, and sought to compel the defendant States to admit Idaho to the compact. The Court eliminated this issue by taking jurisdiction only over the equitable apportionment claim.

II - THE FACTS

A comprehensive report on Columbia River Fisheries was prepared for Pacific Northwest Regional Commission in July, 1976, and was received in evidence as Exhibit W-4. It says, p. A-1:

> "The Columbia River System is one of the world's most famous watersheds for production of anadromous fish. Prior to modern man's influence, some 163,200 square miles of watershed contained habitat ideal for salmon and trout. Today, less than 72,800 square miles remain accessible to anadromous fish and much of that has been transformed to aquatic environment adverse to salmon and steelhead."

The fish are hatched in fresh water gravel bars throughout the Columbia Basin. After remaining about two years in the hatch area, the fish as "smolts" develop an instinctive urge to migrate to the ocean where they spend one to four years

growing and maturing. As adults, some weighing over 40 pounds, they school, return to the Columbia River, and migrate upstream to the waters of origin where they spawn and complete the life cycle.

In the course of migration to the ocean and return to the area of origin, the fish encounter eight dams of the United States Corps of Engineers. The dams, listed in upstream order are:

1 - Bonneville located about 130 miles above the mouth of the Columbia and constructed in 1938.

2 - The Dalles located about 46 miles above Bonneville and constructed in 1957.

3 - John Day located about 24 miles above The Dalles and constructed in 1968.

4 - McNary located about 76 miles above John Day and constructed in 1953. The confluence of the Columbia and Snake is about 32 miles above McNary.

5 - Ice Harbor located on the Snake about 10 miles above the confluence of the Columbia and Snake and constructed in 1961.

6 - Lower Monumental located about 32 miles above Ice Harbor and constructed in 1969.

7 - Little Goose located about 39 miles above Lower Monumental and constructed in 1970.

8 - Lower Granite located about 37 miles above Little Goose and constructed in 1975.

At each dam water is released either through spillways or through the turbines used to generate electric power. Spills reduce the amount of water available for power generaton. Storage of water at each dam is affected by natural precipitation in the upstream drainage and by the storage of water in

upstream projects, including dams of the Corps of Engineers, of the Bureau of Reclamation, and of utilities licensed by the Federal Power Commission, now the Federal Energy Regulatory Commission, see 42 U.S.C.§§7171 and 7172. Each of these agencies exercises control over water releases. Tr. 207-208.

Without provision for spill water, the migrating smolts must pass through the turbines with resulting high mortalities. Smolts escaping over the spillways are subject to substantial mortalities caused by nitrogen supersaturation. As the water plunges many feet to the base of the dam, it becomes saturated with nitrogen and produces in the fish a condition similar to the bends encountered by deep-sea divers. Tr. 119, and Ex. W-4, p. A-15.

Another cause of downstream loss is residualism. The smolts become disoriented in the slack water and lose the urge to migrate to the ocean. Tr. 243 and Ex. W-4, p. A-15. Water temperature is another adverse factor. Impoundment causes an increase in water temperature above the tolerance of some fish with resulting susceptibility to disease. Cooler temperatures may be obtained by releases from upstream impoundments which are largely under federal control.

The mortality of downstream migrants may reach 95% in low water years. See Columbia Basin Salmon and Steelhead Analysis, Ex. W-3, p. 6, and Ex. W-4, p. A-15.

To reduce juvenile mortality on downstream runs, the Corps of Engineers and the National Marine Fisheries Service have experimented with, and financed, a program for the collection of juveniles at Little Goose and Lower Granite Dams and transportation by truck and barge about 345 miles for release below Bonneville. See Ex. W-4, p. D-8, Ex. W-3, p. 41, and Tr. 140, 244. Success of the transportation technique has been demonstrated for summer Steelhead but not for spring or summer Chinook juveniles. Tr. 262.

The catch of anadromous fish during the one to four years that they spend in the ocean is controlled by the Fishery Conservation and Management Act of 1976. 16 U.S.C. § 1801

et seq. Under this Act, the federal government exercises jurisdictional control over ocean fishery in the 200-mile zone, except for the three-mile territorial area of the coastal states. The Act provides for regional fishery management councils which regulate the ocean catch and thereby affect the number of fish returning to the Columbia.

The adults returning to their Idaho spawning areas must pass the eight dams. Upstream migration is facilitated by fish ladders at each dam. These ladders are installed, maintained, and operated by the Corps of Engineers. Some fish ascending the ladders are lost by "fall-back" resulting from disorientation and downstream return over the spillways. Tr. 123. The loss of upstream migrants at each main stem dam has been estimated at 15%. Ex. W-3, p.6.

Idaho, although an inland state, has some 3,000 miles of quality fish habitat. In both Idaho and other parts of the Basin, the various water use projects have drastically reduced the spawning area. Artificial production now accounts for fifty percent of all fish returning to the Columbia River System. Ex. W-1, p. 2.

Access to two areas in Idaho is blocked by dams. The Hells Canyon Dam prevents fish from going further upstream on the Snake. The Dworshak Dam on the North Fork of the Clearwater, a tributary of the Snake, bars passage by fish. To mitigate the loss of spawning area because of the dams, Idaho has increased production from fish hatcheries. These hatcheries are financed by Idaho Power Company, a private utility which built and operates Hells Canyon Dam, by the Federal government and the Columbia River Basin Commission, and by Idaho from money derived from fishing permits. Tr. 267. The Rapid River Hatchery on Salmon River, a tributary of the Snake, is the most successful spring Chinook hatchery in the Pacific Northwest and produces 20-40 percent of the fish returning to the Snake River and its tributaries. Tr. 251-252. Some of the hatcheries are on the Snake above Hells Canyon Dam. The product of these hatcheries is taken by truck to the Salmon River drainage and there released.

The contribution of Idaho to the total System fishery is substantial. The Idaho statement supporting its motion to file the complaint, p. 8, asserts that 9,330,300 spring Chinook, 330,037 summer Chinook, and nearly seven million Steelhead were planted in Idaho during 1974. No defense evidence controverts these figures. On the record presented, no year-by-year comparison may be made between Idaho production and harvest of fish. Ex. W-3, Table 5, p. 26, shows the Idaho catch of Chinook to have been 15,000 in 1954 and 1,500 in 1974, and of Steelhead to have been 12,000 in 1954 and 3,000 in 1974. Idaho produces many fish and receives few.

The downstream catch of fish is divided between the Indians and the non-Indians. Indians take fish for ceremonial, subsistence and commercial purposes. The non-Indians in Oregon and Washington take fish for sport and commerce. Non-Indian fishing is regulated by state law. Commercial fishing is currently permitted in two distinct zones. In a 130 mile stretch below Bonneville Dam fishing is allowed to licensees but in recent years, regulations of Oregon and Washington have drastically limited the catch. Above Bonneville commercial fishing has been permitted only for Indians since 1957. Ex. W-2, p. 2-4.

There has been no regular summer season for commercial catch of summer Chinook since 1964, Ex. W-2, p. 14, and no sport fishery during 1964-1976. Id. Commercial harvest for up-river spring Chinook was limited to 11 days from 1967 through 1973 with a one-day season in 1974 and none in 1975 or 1976. Id. at 9-10. The commercial catch of Steelhead has been limited for some time, see Ex. W-2, pp. 24-26, and W-3, pp. 17-18. In 1975 and 1976, the mainstream Columbia and Snake, and their tributaries, were closed to Steelhead recreational harvest to protect poor runs. Ex. W-2, p. 26.

The Indian catch of Salmon and Steelhead increased from a low of 39,700 pounds in 1959 to a high of nearly three million pounds in 1975 and 1976. Ex. W-2, p. 4, and Figure 2 on p. 5. The Idaho complaint alleges ¶ XX, pp. 19-20, that Idaho has no commercial fishing for anadromous fish but maintains a sports fishery for residents and tourists. The record

shows nothing to the contrary. To a substantial extent, Idaho is subsidizing the downstream fishery, both Indian and non-Indian.

The 1855 treaties with the tribes recognize that the Indians have "the right of taking fish at all usual and accustomed places in common with the citizens of the Territory * * *." See e.g. treaty with the Yakima Nation, 12 Stat. 951, 953. In considering a similar provision in the treaty with the Puyallup Tribe, the Court said, Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, 398, that the right to fish "at all usual and accustomed" places may not be qualified by the State but "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." When the Puyallup case was again before the Court, it adhered to the quoted ruling. See 414 U.S. 44, 45.

III – PENDING DISTRICT COURT LITIGATION

This brings us to the pending litigation in the United States District Court for the District of Oregon. Sohappy v. Smith is a case brought in 1968 by members of the Yakima Tribe against Oregon officials for a definition of the Indian treaty rights. Shortly thereafter, the United States brought a similar suit against Oregon in the same court on behalf of various tribes. The Warm Springs Tribe which is one of the tribes of central Oregon, the Yakimas, the Umatillas, and the Nez Perce Tribe were permitted to intervene in United States v. Oregon and that case was consolidated with Sohappy v. Smith. After trial without jury, the court, in 1969, ruled that the state was limited in its power to regulate the exercise of the Indians' treaty rights in that the regulation must be necessary for the conservation of the fish, the state restrictions must not discriminate against the Indians, and must meet appropriate standards. Sohappy v. Smith, D.C.Ore., 302 F.Supp. 899, 910-911. The court retained continuing jurisdiction. In 1974, a dispute arose over the spring run of Chinook Salmon. The State of Washington was permitted to intervene. The

previously entered judgment was amended thus, see Sohappy v. Smith, 529 F.2d 570-572:

> "The Indian treaty fisherman are entitled to have the opportunity to take up to 50% of the harvest of the spring Chinook Salmon run destined to reach the tribes' usual and accustomed grounds and stations. Except insofar as amended here, the 1969 judgment remains in full force and effect."

On appeal the amendment was approved, Sohappy v. Smith, 9 Cir., 529 F.2d 570. The court noted:

> "the merit in the States' contention that they should have an opportunity to make a record concerning the propriety of the district court's apportionment of spring Chinook Salmon runs yet to occur." Id. at 573.

The case was remanded to give the States an opportunity to make the requested record. The State of Idaho was not a party to the Sohappy v. Smith litigation.

On February 28, 1977, the district court, in Sohappy v. Smith, approved "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Trubutaries above Bonneville Dam." The Plan was signed by representatives of the United States, Oregon, Washington, and each of the intervening Indian tribes. See Ex. 0-12A, pp. 44-57; a copy of the Plan is attached as Appendix A to Oregon's motion to dismiss. Idaho is not a party to the Plan.

The Plan announces controlling principles, creates a technical advisory committee, provides detailed management directions, establishes priorities, and after five years may be terminated by any party on 30 days written notice.

The Plan sets various escapement goals which relate the

runs at Bonneville and at Lower Granite. The goals must be converted into actual allocations. Determination of both goals and allocations is difficult because of the many variables. Prediction of runs must be made before they occur. Among the basis for predictions are downstream runs of a particular group of fish and a count of jack fish, which are precocious males that return one year before their age group. Tr. 143. After the runs begin, the fish are counted in facilities connected with the fish ladders. Tr. 134-135. On the basis of catch information, run size, and river conditions, management decisions are made from day to day. Tr. 190-191. Flexibility to make immediate decisions is important. Tr. 192.

The Plan gives first priority to Treaty ceremonial and subsistence catch. The Plan makes various allocations to both Indian and non-Indian fishermen. The Indians agree to forego a target commercial fishery for Steelhead. Because of precariously low runs, the catch of summer Chinook is severly limited. The catch of spring Chinook is governed by a complex formula. See Ex. 0-12A, pp. 52-54, and Tr. 168-169. In sum, the Plan is complicated in its details and can succeed only with continued, cooperative and expert administration. The record does not show either the past or future impact of the Plan on Idaho; and Idaho, a non-party, may not compel adherence to the Plan.

IV - JURISDICTION

The defendant States contend that the Supreme Court should not take jurisdiction because of the previously commenced, and still pending, Sohappy v. Smith case in the federal district court. The Supreme Court has original and exclusive jurisdiction over all controversies between two or more States, 28 U.S.C. § 1251(a) (1), and a responsibility to exercise that jurisdiction when it is properly invoked. See Cohens v. Virginia, 6 Wheat, 19 U.S. 264, 404; Massachusetts v. Missouri, 308 U.S. 1, 19-20.

United States v. Oregon, consolidated with Sohappy v. Smith, is not within the Court's original and exclusive jurisdiction but within the concurrent jurisdiction of the Supreme Court and the district court. See 28 U.S.C. § 1251(b) (2),

and Case v. Bowles, 327 U.S. 92, 97. Permission for the instant case to go forward will result in duplicate litigation to some extent. Sohappy presents allocation of fish among the United States, Oregon, Washington and the four Indian tribes. Any decision in Sohappy will not bind Idaho. The case at bar relates to allocation of fish among Idaho, Oregon, and Washington. Any decision of the case at bar, in its present posture, will not bind the United States or the Indians.

Colorado River Water Conservation District v. United States, 424 U.S. 800, and Will v. Calvert Life Insurance Co., ____U.S.____, decided June 23, 1978, are not in point because they involved duplicate litigation in federal and state courts. Each of those decisions recognized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817 and in Will v. Calvert slip opinion, pp. 7-8.

The Court, in its discretion, may decline to exercise its original jurisdiction. See Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497-499. In the situation presented, no other suitable forum is available. Cf. Massachusetts v. Missouri, 308 U.S. at 10. The question is whether the jurisdiction of the Court is properly invoked. The answer requires consideration of Idaho's complaint.

V - SUFFICIENCY OF COMPLAINT

Oregon and Washington argue that the Idaho complaint fails to state a claim upon which relief may be granted. The gist of the complaint is that the defendant States have deprived Idaho of its equitable share of the anadromous fishery of the Columbia River System. The defendants say that the fish are migratory ferae naturae, not subject to ownership until reduced to possession. The lack of a property right is said to foreclose justiciability. See e.g. Georgia v. Stanton, 73 U.S. 50, 76. The argument is that, without a property right in the fish, loss of fishing opportunity is not an actual injury of serious magnitude justifying invocation of the Court's original jurisdiction. See New York v. New Jersey, 256 U.S. 296, 309, and Missouri v. Illinois, 200 U.S. 496, 521.

In Missouri v. Holland, 252 U.S. 416, the Court rejected the claim of Missouri that the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., unconstitutionally deprived Missouri of its authority over migratory birds temporarily within the State.

The Court said that "as between a State and its inhabitants the State may regulate the killing and sale of such [migratory] birds," Id. at 534, and held that the authority is subject to the supremacy of valid treaties and federal statutes. Id. at 534-535. Defendants argue that recognition of a State's limited authority over a migratory resource within it forecloses another state from asserting an extraterritorial claim to the migrating anadromous fish. No supremacy claim is presented in the instant case. Idaho does not deny the authority of Oregon and Washington to regulate fishery within their borders but says that the exercise of that authority has deprived Idaho of its rightful share of the fish.

In Missouri v. Holland, the Court commented, 252 U.S. at 434, that "[w]ild birds are not in the possession of anyone; and possession is the beginning of ownership." In Douglas v. Sea Coast Products, Inc., 431 U.S. 265, the Court invalidated state statutes limiting fishing rights of aliens and non-residents because of the supremacy of federal statutes. Id. at 286-287. The Court commented, Id. at 284:

> "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. [citation] The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' "

The question is not ownership or regulation but power of

the lower States to prevent Idaho from receiving its share of a natural resource. The Court has held that a State does not have power to forbid the exportation of natural gas produced and needed in the State. Pennsylvania v. West Virginia, 262 U.S. 553, 593. The Court said that the State law was an impermissible interference with interstate commerce. Id. The question of whether fish migrating from State to State are a commodity moving in interstate commerce, c.f. Philadelphia v. New Jersey, ____U.S.____, decided June 23, 1978, need not be decided. "[T]he states are not separable economic units."Hood & Sons v. Du Mond, 336 U.S. 525, 537-538. "[O]ne state in its dealing with another may not place itself in a position of economic isolation." Baldwin v. Seelig, 294 U.S. 511, 527.

Anadromous fish migrate from state to state and while in each state are an important resource. For one state to exercise plenary control over migratory fish is comparable to the exercise of such control over flowing water by an upper state to the detriment of a downstream state. The Court has taken jurisdiction over, and decided, a number of interstate suits for the equitable apportionment of water. See e.g. Kansas v. Colorado, 206 U.S. 46, Nebraska v. Wyoming, 325 U.S. 589, and Arizona v. California, 373 U.S. 546. In Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110, the Court said:

> "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

The federal common law mentioned in Hinderlider should be as applicable to migratory fish as it is to flowing water.

The sufficiency of the complaint must be "considered in the untechnical spirit proper for dealing with a quasi-international controversy." Virginia v. West Virginia, 220 U.S. 1, 27. See also Kansas v. Colorado, 185 U.S. 125, 145. In original actions the Court "has always been liberal in allowing full

development of the facts." United States v. Texas, 339 U.S. 707, 715. The question of whether a state may maintain an original action for the apportionment of migratory fish is one of first impression and should be decided after trial on the merits, not on the pleadings. The complaint states a justiciable controversy proper for the Court to consider and determine in the exercise of its original jurisdiction.

VI - INDISPENSABILITY

By its December 7, 1976, order the Court took jurisdiction of this case on a limited issue and left "open the question of the indispensability of the United States as a party for decision after evidence, in the event that the United States does not enter its appearance in the case." 429 U.S. 163, 164.

When the case was pending on Idaho's motion for leave to file the complaint, the Solicitor General, at the invitation of the Court, filed a memorandum saying that the United States is an indispensable party to the litigation and pointing out that the United States is trustee for the Indians who have treaty protected fishing rights in the basin. At a June 29, 1977 hearing before the Special Master, the United States had present a representative as an observer. He said that the United States had not decided whether to intervene. Tr. 23-26. No one was present for the United States at the January 9-10, 1978, hearing on the affirmative defenses. On April 10, 1978, the Master received and filed a memorandum for the United States as amicus curiae. Therein, the United States asserts that it is an indispensable party because of (1) the Indians' treaty rights, (2) the operation by the Corps of Engineers of eight dams on the Columbia and Snake, and (3) the management by the United States of the off-shore fishery.

The Indians are wards of the United States and subject to its plenary control. See United States v. Sandoval, 231 U.S. 28, 45, and United States v. Candelaria, 271 U.S. 432, 443. An unconsented suit may not be brought against the United States, see United States v. Sherwood, 312 U.S. 584, 586, or against an Indian Tribe, see Turner v. United States, 248 U.S. 354, 358. The rule applies to suits by States. See Kansas v. United

States, 204 U.S. 331, 342; Arizona v. California, 298 U.S. 558, 568; and Minnesota v. United States, 305 U.S. 382, 386-388.

Shields v. Barrow, 17 How., 58 U.S. 130, 139, defines indispensable parties thus:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

See also Barney V. Baltimore City, 6 Wall. 280, 284-285. In Niles-Bement Co. v. Iron Moulders Union, 254 U.S. 77, 80, the Court observed that "[t]here is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not, * * *."

Rule 19(b), F.R.Civ.P., lists four factors for consideration in determining whether in equity and good conscience a case should proceed or be dismissed for nonjoinder of an interested party. Application of the Rule is appropriate and its provisions may be taken as a guide to procedure in original actions. See Supreme Court Rule 9(2). Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116, rejected the argument that Rule 19 is an ineffective change of the substantive rights created in Shields v. Barrow and said that it is "on the contrary, a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person." 390 U.S. at 125. The four factors are, (1) prejudice to a non-party, (2) decrease or avoidance of that prejudice by protective provisions in the judgment, (3) adequacy of the judgment in the absence of the non-joined party, and (4) adequacy of plaintiff's remedy if the action is dismissed for nonjoinder.

With regard to factors (1) and (2), Idaho says that it seeks an equitable apportionment of those fish which remain after satisfaction of the Indian rights and, hence, there is no prejudice

to the Indians or to the United States as their trustee, and no need to consider protective provisions in the judgment.

Puyallup recognizes the right of the states to provide nondiscriminatory and appropriate regulations "in the interest of conservation." 414 U.S. at 45. The 1969 decision in Sohappy held, 302 F.Supp. at 911, that the Indians "are entitled to a fair share of the fish produced by the Columbia River System" but did not define that share. The 1974 amendment to the decree established a 50-50 division of fishing opportunity for spring Chinook. 529 F.2d at 572-573.

Idaho accepts these decisions and makes no complaint against the operation by the United States of the dams which affect both the downstream and upstream runs of fish. In the circumstances, the rights of the United States will not be prejudiced if the action proceeds, and no protective provisions in the decree will be required. The position taken by Idaho may eliminate factors (1) and (2), but does not dispose of the problem.

Factor (3) pertains to the adequacy of the judgment in the absence of the nonjoined party. The word "adequate" as used in the Rule means that the judgement must determine effectively the issues presented. The issue is the division of the non-Indian share of the fish among Idaho, Oregon, and Washington. The right of each state depends on the number of fish left after satisfaction of the Indian share.

The Indian right is variable, fluctuating from year to year and dependent on many conditions, both natural and man-made. The vagaries of climate determine the quantity of water flowing in the System. The size of the fish runs is affected by the dams of the Corps of Engineers. The ocean catch is controlled by a federal statute. The non-Indian commercial catch occurs below Bonneville and is controlled by Oregon and Washington.

Apportionment to Idaho requires some downstream limitation on the harvest of fish by Oregon, Washington, and the Indian tribes. The treaty rights of the Indians to ceremonial and

subsistence fishing have top priority. Sport fishing on the main stem of the Columbia and on the Snake between its confluence with the Columbia and entry into Idaho may be restricted but on the record presented, the fish which might become available to Idaho as a result of decreased sport fishing is uncertain. Indian commercial fishing takes substantial and increasing quantities of fish. The non-Indian commercial catch has decreased in recent years because of restrictions imposed by Oregon and Washington. Restrictions on commercial catch may be needed to allow the escapement of fish to Idaho in satisfaction of whatever apportionment is given it.

Increased escapement at Bonneville will not assure that an increased number of fish will reach Idaho. More fish will be available for Indian harvest and, in the absence of the United States and the Tribes, no control may be exercised over the Indian harvest. The benefit to Idaho is uncertain but the detriment to non-Indian commercial fishing below Bonneville is apparent. An adequate decree should recognize, assure, and protect all interrelated rights. It cannot do so unless all affected parties are bound.

In Sohappy the amended decree gives the Indians "the opportunity" to take fifty percent of the harvest of the spring Chinook destined to reach the tribes' usual grounds. 529 F.2d at 570-572. The Sohappy five-year managment plan provides that the run size is determined by the number of fish *"entering* the Columbia River *destined* to pass Bonneville Dam." Entitlement to fish is in fixed numbers dependent on the run size which varies from year to year and depends on many factors. Any decreed apportionment will require predictions and day-to-day supervision because of the many variables.

The necessity of continuing district court supervision was recognized in United States v. Washington. See the concurring opinion of District Judge Burns who refers to the role of the judge as a "perpetual fish-master." 520 F.2d at 693. The Court has been reluctant to appoint a special master to supervise obedience of a Court judgment. In Vermont v. New York, 417 U.S. 270, the Special Master appointed by the Court recommended approval of a consent decree calling for the appoint-

ment of another Special Master to police execution of the decree. After reviewing its pertinent decisions, Id. at 274-276, the Court rejected the appointment of the Special Master to police the settlement and pass on to the Court his proposed resolution of contested issues saying, 417 U.S. at 277:

> "Such a procedure would materially change the function of the Court in these interstate contests. Insofar as we would be supervising the execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner."

Any decree in this case for an apportionment will require constant supervision and the exercise of continuing jurisdiction. The decisions of the "fish-master" will relate to facts, not to law, and will have nothing to do with the Court's performance of its Article III judicial functions. Id. at 277.

The district court decision in Sohappy v. Smith summarizes the situation thus, 302 F.Supp. at 910-911:

> "In considering the problem of salmon and steelhead conservation in the Columbia River and its tributaries, it is necessary to consider the entire Columbia River System.
>
> * * *
>
> This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery * * *. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination. * * * the variables that must be weighed in each given instance make judicial *review* of state action, through retention of continuing jurisdiction, more appropriate than

overly-detailed judicial pre-determination.' "

An adequate apportionment decree requires (1) a recognition of the interrelated rights of all parties with a division on a basis which is necessarily variable and (2) continuing administration to assure compliance with the division. Such a decree is impossible because of the absence of the United States and of the undesirability, if not impropriety, of the Court undertaking continued regulation of the Columbia River fishery.

Factor (4) of Rule 19(b) relates to the adequacy of a remedy for the plaintiff if the action is dismissed for nonjoinder. Oregon and Washington argue that Idaho could intervene in the Sohappy litigation to which the United States, Oregon, Washington and the Indian tribes are parties. The litigation is now ten years old and has gone once to the court of appeals. An attempt by Idaho to intervene now would be subject to the objection of untimeliness. If the intervention sought determination of the relative rights of all parties, the objection may be made of an impermissible enlargement of the issues. Also, intervention by Idaho in Sohappy would, at the least, inject in that suit a controversy between two or more states and beyond district court jurisdiction, and, at the most, present an unconsented suit against the United States. Intervention by Idaho in Sohappy does not present an adequate remedy. The parties suggest no other remedy. In short, the immunity of the United States presents an insurmountable barrier to a legal remedy.

A balancing of the Rule 19(b) factors shows on one side of the scale that the nonjoinder will result in no prejudice to the absent party and that Idaho has no adequate legal remedy. On the other side, the absence of the United States makes the entry of an adequate judgment impossible and tips the scales in favor of the conclusion that the United States is an indispensable party without which the action may not proceed. The result accords with the principles announced in Shields v. Barrow and with actions taken in other interstate controversies.

In the instant case the rights, duties, and responsibilities

of the United States and its agencies are as great as those present in Arizona v. California, 298 U.S. 558, where the Court denied permission to file a complaint because of the absence of the United States as a party. Idaho relies on the decision in Nebraska v. Wyoming, 295 U.S. 40, 43, which held that the Secretary of the Interior, whose rights as an appropriator were subject to Wyoming law and who would be bound by an adjudication of Wyoming's rights, was not an indispensable party. The United States was later permitted to intervene in that litigation. In the case under consideration, the United States has rights not subject to state law and is not bound by a decree in a case to which it is not a party.

In Texas v. New Mexico, 352 U.S. 991, the complaint was dismissed because of the absence of the United States as an indispensable party. The suit was concerned with the claim of Texas that New Mexico had violated the Rio Grande Compact. The Report of the Special Master is partially reproduced as an Appendix to the brief of Washington on its affirmative defenses. The Master concluded, App., p. 17, that the United States was indispensable because of its interest in the rights of the Indians to certain storage water. The treaty rights of the Indians to fish are of equal importance.

In Colorado v. Kansas, 320 U.S. 383, an original interstate suit relating to the apportionment of the water of the Arkansas River, the Court said, Id. at 392:

> "The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause

> of the federal Constitution. We say of this case, as the Court has said of interstate differences of like nature, that such mutual accomodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." (Footnotes omitted.)

The preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and philosophical conflicts not solvable by judicial action. To mention but one problem, the downstream migration of the smolts is aided by provision for spill water so that the smolts do not have to pass through the turbines. Water which spills is unavailable for power generaton. Hence, a direct conflict arises between the ever-increasing demand for electrical energy and the preservation of the anadromous fish. Agencies of the United States control the spills. The States do not; they can only request.

Any determination of the rights of the three states fails to resolve the entire problem. The rights and obligations of the United States, both as trustee of the Indians and as proprietor of the facilities utilizing the waters of the System, must be considered. The duties of the United States as trustee may conflict with its interests in developing and using the water for economic purposes which are incompatible with preservation of the fish runs. As noted by the United States in its Memorandum as Amicus Curiae on Idaho's motion to file a complaint, p. 4, n. 3, a conflict may exist between uptream and downstream tribes. The answer to all the conflicts presented is mutual accomodation and expert administration, not litigation.

VII - RECOMMENDATION

The Special Master recommends that the action be dismissed because the United States is an indispensable party which may not be joined without its consent.

Denver, Colorado
July 31, 1978

Jean S. Breitenstein
Room C-446 U.S. Courthouse
1929 Stout Street
Denver, Colorado 80294
Special Master

SUPPLEMENTAL REPORT
RULINGS OF SPECIAL MASTER ON EXCEPTIONS AND OBJECTIONS TO HIS REPORT

Each of the parties has filed exceptions and objections to the Report of the Special Master. At the request of Idaho, and with the consent of Oregon and Washington, the Master extended time for objections and exceptions to his July 31 Report on the Affirmative Defenses until October 16. All three States filed objections and exceptions which were set for argument on November 8.

On October 16, the Master wrote Mr. Steven B. Carroll, attorney in the Department of Justice, who had previously appeared at the hearings as an observor, and requested information whether the United States had changed its decision not to intervene in the case. On November 3 the Master received Idaho's "Motion to Reschedule Oral Argument." On November 7 the Master received a letter from Solicitor General McCree which appears in the record at Tr. 380-380A. The letter said, among other things:

> "* * * we have only just been requested by the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho to consider advancing their treaty fishing rights in this case.
>
> * * * *
>
> "We are advised that the State of Idaho will be moving for a postponment of the hearing [on objections and exceptions to the Master's Report]. In the circumstances, we suggest that the request is appropriate. Since the status quo is preserved, it does not appear that any party would be prejudiced by such a delay. Perhaps, in order to assure you, however, that no further postpone-

ment is required, the hearing should be rescheduled no sooner than February 1, 1979."

On November 7 the Master also received a Motion of the Shoshone-Bannock Tribes for leave to file an amicus curiae brief supporting the Idaho request for a rescheduling of the hearing on the objections and exceptions to the Master's Report. The Shoshone-Bannock Tribes asserted their location in Idaho, their treaty rights, and their request that the United States as their Trustee protect those rights.

At the November 8 hearing, representatives of each State were present along with Mr. Carroll as an observor for the United States, and attorneys representing the Shoshone-Bannock Tribes. In the circumstances presented the Master allowed the filing of the amicus curiae brief. Tr. 391. The Master denied the requested continuance. Tr. 408.

The Master heard the arguments on the objections and exceptions to his Report. At the conclusion of the arguments, and over the objections of Oregon and Washington, the Master stated that in the circumstances presented, the Report would not be filed with the Court until after February 1. See Tr. 440-441 and 448. The Master further said that no further requests for additional time would be favorably received. Tr. 449. The Solicitor General in a January 30,1979, letter to the Special Master said that the United States adhered to its decision not to intervene in this case and suggested that a dismissal of the action because of the indispensability of the United States should be without prejudice.

Exceptions of Idaho

Idaho's exceptions I and IV to the Master's Report say in effect that the original jurisdiction of the Supreme Court, Const. Art. III, § 2, cl.2, and 28 U.S.C. § 1251(a), must be exercised to secure domestic tranquility. Idaho emphasizes that it has no other remedy than suit. The makers of the Constitution did not provide that the United States may be joined without its consent when one State invokes original Supreme Court jurisdiction in a controversy with another

State. Congress has not given its consent to suit by Idaho for apportionment of the Columbia River anadromous fishery. The Executive has not sought leave to intervene. The problem is solvable by obtaining the consent of Congress to suit or by voluntary application of the Executive branch for leave to intervene. The determination of an interstate controversy is important to domestic tranquility, but the Court cannot act for either the Legislative or the Executive branch. The procedural flexibility given and intended by Supreme Court Rule No. 9 does not change the substantive law. Without the United States as a party, in both its proprietary and trustee capacities, any decision in the instant case would be advisory, not conclusive.

Idaho's Exception II attacks the Master's holding that the United States is indispensable because of (1) the activities of its agencies and (2) its status as trustee of the Indians. The dams built, or licensed, by federal agencies control the regimen of the river. The Indians have treaty rights to fish and, as trustee, the United States has the duty to protect those rights. From a practical standpoint any apportionment to Idaho requires some arrangement so that a sufficient number of upstream migrants get over Bonneville Dam and the seven other dams, and through the Indian reservations, to Idaho in the required numbers. Limitations may be placed on sport and commercial fishing below Bonneville. Those limitations will have to be enforced by Oregon and Washington. The trouble is that getting the fish above Bonneville does not solve the problem. Some fish will return to upstream spawning grounds on the Columbia and its tributaries other than the Snake. Those fish cannot be sorted out below Bonneville. The fish ladders necessary to upstream passage are controlled by the United States. Indian fishing may not be controlled by a decree in the instant case because neither the United States nor the Indians are parties. A judgment which depends on the actions of non-parties for enforcement is not adequate. The Master adheres to his application of the principles contained in Rule 19, F.R.Civ.P.

Idaho's Exception III says that (1) an apportionment decree will be susceptible to judicial determination and en-

forcement, and (2) not unduly burdensome to the Court. An apportionment among the Indians and non-Indians was provided by the Plan approved in the Sohappy v. Smith case. The Master can add nothing to his discussion of that Plan in his Report. The Plan shows the need for constant supervision during the fish runs. Any provision for future modification of the decree does not dispense with the need for continuing administration.

The Master overrules each and all of the exceptions and objections of Idaho.

Exceptions and Objections made by both Oregon and Washington.

To preserve their record, Oregon and Washington each except and object to the rulings of the Special Master that (1) jurisdiction is not barred by the pending Sohappy v. Smith litigation and (2) the Idaho complaint does not state a justiciable controversy. The Master adheres to the rulings stated in his Report.

Exceptions and Objections of Washington

Washington calls attention to several clerical errors, all of which have been corrected.

The Master noted the hatchery fish production in Idaho. Washington objects that the Idaho production should be placed in proper perspective to the total hatchery production in the Columbia and Snake Basins. Ex. W-3, p. 9, shows a 1974 production of 151.8 million Salmon and Steelhead smolts in the Columbia Basin, plus a minor number from ten unnamed hatcheries. Ex. W-4, Table 4, p.m-17, shows that in 1974 the pounds of Salmon and Steelhead smolts planted in the Columbia Basin were: Snake, Salmon, and Clearwater Rivers (in Idaho) 988,490, Columbia above Snake, 566, 438, and Columbia below Snake, 4,228,177.

Witness Holubetz testified, Tr. 267, that none of the money associated with the operation of Idaho hatcheries "comes from tax funded money to the State of Idaho." Ex. W-3, p. 9, says:

"The federal government (federal taxpayers and water project beneficiaries) and public and private utilities (ratepayers) paid for approximately 90% of this [hatchery] production as partial compensation for destruction of salmon and steelhead habitat. The states (state taxpayers and fishing licenses) paid 10%."

RECENT SUPREME COURT ACTIONS

On October 16, 1978, the Supreme Court granted certiorari in the following cases:

77-983	For review of decisions of Supreme Court of Washington in Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wn2d 276, 571 P.2d 1373, and Puget Sound Gillnetters Association v. Moos, 88 Wn2d 677, 565 P.2d 1151.
77-119)) 78-139)	For review of decisions of Ninth Circuit Court of Appeals in United States v. State of Washington, 573 F.2d 1118, and Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington ,573 F.2d 1123.

All of the cases are concerned with allocation of fish among Indians and non-Indians in Washington. None are concerned with the allocation of fish to Idaho or in Oregon. The treaty provisions relating to Indian fishing rights appear to be the same as those pertinent to the instant suit. It may be that action or the cases in which certiorari has been granted will determine the respective fishing rights of the Indians and non-Indians in the State of Washington. Because of the absence of Oregon and Idaho as parties, no determination seems possible of the relative rights of Washington, Oregon, Idaho, and the Indians. That determination will have to await either (1) litiga-

tion in which the three States and the United States are parties or (2) a non-judicial solution.

AMENDED RECOMMENDATION

The Special Master recommends that the action be dismissed because the United States is an indispensable party which may not be joined without its consent. The Master further recommends that the dismissal be without prejudice to the right of Idaho to refile at some later date if Idaho is wholly unable to obtain a remedy through agreement.

Denver, Colorado
February 2, 1979

Jean S. Breitenstein
Room C-446 U.S. Courthouse
1929 Stout Street
Denver, Colorado 80294
Special Master

Supreme Court, U. S.
FILED
MAY 2 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

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DAVID H. LEROY, Attorney General;
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v.

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Defendants

PLAINTIFF'S EXCEPTIONS TO REPORT AND SUPPLEMENTAL REPORT OF THE SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

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v.

STATE OF OREGON, STATE OF WASHINGTON,
Defendants

PLAINTIFF'S EXCEPTIONS TO REPORT AND SUPPLEMENTAL REPORT OF THE SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

DAVID H. LEROY
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STATEMENT

On February 2, 1979 Special Master Jean S. Breitenstein submitted the report and supplemental report (hereafter "Master's Report") on the defendants' affirmative defenses to the United States Supreme Court. The Master's recommendation to the Court was dismissal of Idaho's complaint for failure to join the United States. The State of Idaho respectfully submits the following exceptions to the Master's Report.

INTRODUCTION

The amended recommendation of the Special Master imposes a peculiar dilemma upon the United States Supreme Court. Although the Master concluded the United States to be an indispensable party whose joinder is barred by sovereign immunity, the recommendation was that, "the dismissal be without prejudice to the right of Idaho to refile at some later date if Idaho is wholly unable to obtain a remedy through agreement." Master's Report, 31.

This finding of indispensability cloaked with federal immunity has created an unreasonable blockade to Idaho's constitutional right to litigate its grievance against Oregon and Washington, notwithstanding the rationalization that dismissal without prejudice will somehow provide a forum in future years.

A. The Master's Findings of Factual Background Are Supportive of Idaho's Claim.

Idaho brought suit against Oregon and Washington in the United States Supreme Court to protect its diminishing runs of spring chinook salmon, summer chinook salmon, and summer steelhead. The inability to negotiate any meaning-

ful alteration of downstream harvest practices in the lower Columbia River led Idaho to such action. The controversy over allocation of anadromous fish returning up the Columbia River has been going on for years. Master's Report, 5. Idaho's efforts to become a member of the Oregon-Washington Columbia River Fish Compact have failed. Master's Report, 6. Idaho is not a party to *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969), *affirmed and remanded*, 529 F. 2d 570 (9th Cir. 1976) which is presently pending under a five year settlement agreement, sanctioned by the Oregon District Court, that establishes an allocation of anadromous fish in the Columbia River among Oregon, Washington and four Indian Tribes.[1] Master's Report, 5, 12. That settlement agreement is attached to this brief as Appendix A. Because Idaho's complaint involves a controversy between states, no forum other than the United States Supreme Court is available to Idaho for adjudication of its grievance. Master's Report, 14.

Except for the question of federal indispensability, the Master's findings and conclusions are generally supportive of Idaho's position. The Master properly framed the overriding issue to be, "...not ownership or regulation [of anadromous fish migrating through interstate waters] but power of the lower states to prevent Idaho from receiving its share of a natural resource." Master's Report, 15-16. Idaho claims that the exercise of authority by Oregon and Washington to regulate the anadromous fishery resources within their borders

---

[1]This settlement agreement is entitled, "A Plan for Managing Fisheries On Stocks Originating From the Columbia River and its Tributaries above Bonneville Dam," and was adopted by Order of the United States District Court for the District of Oregon on February 28, 1977, *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969).

has deprived Idaho of its equitable share of the returning runs of salmon and steelhead. Master's Report, 15. To that end, the Master concluded that Idaho's complaint presented a justiciable controversy between states which was properly before the United States Supreme Court for consideration and determination under the Court's original and exclusive jurisdiction. Master's Report, 4, 17.

Specifically, the Master made findings that "[t] he contribution of Idaho to the total System fishery is substantial" and "that Idaho produces many fish and receives few." Master's Report, 10. Based upon those findings, the Master concluded, "[t]o a *substantial* extent, Idaho is *subsidizing* the *downstream* fishery, *both Indian and non-Indian*." Master's Report, 11. (Emphasis added.)

Such findings support Idaho's constitutional right to present its claim for equitable apportionment of the upriver salmon and steelhead resource.

B. The Position of the Federal Government Has Been Split on the Issue of Federal Involvement in this Litigation.

At the November 8, 1978 hearing regarding exceptions to the Master's draft report, the Special Master graciously delayed the filing of his final report until February 1, 1979 in order to allow the United States additional time to consider the question of federal intervention. Contrary to the recommendation of the Department of the Interior,[2] the Department of Justice ultimately adhered to its position of declin-

[2]The recommendation of the Department of Interior supporting federal intervention in this litigation was made by letter to the Department of Justice. Although the Department of Interior's letter was not dated, it was marked as received on January 29, 1979.

ing intervention. The official Department of Interior recommendation to intervene is attached to this brief as Appendix B. Thus, the official position of the United States lacks the clear cut support of a federal department that is highly active in anadromous fishery management in the Columbia River Basin. One government document made available to the State of Idaho analyzed the pros and cons of federal involvement as follows:

* * *

> There are three arguments in favor of intervention: (1) Our duty as trustee to the Shoshone-Bannock Tribe — which is no less than our conflicting duty to defend the status quo insofar as it favors the four Tribes party to the *Oregon* settlement; (2) *the apparent justice of Idaho's claim that it produces many (if not most) of the fish and yet enjoys only a minimal share of the harvestable resources, which is "fished out" before the fish return to Idaho waters;* and (3) *the principle that, wherever the merits lie, we ought not invoke our indispensability and sovereign immunity to block bona fide litigation between States when no other forum is available for resolution of the dispute.*
>
> * * *
>
> . . . The present plan, adopted by the distict court in the *Oregon* case provides that Idaho's sports fishermen shall never see more than 7,500 harvestable salmon no matter how large the run. *This seems inequitable. Nor does Idaho have any obvious alternative forum to test its claim.* If it sought to intervene in the *Oregon* district court case, it would probably be compelled, at this late date, to accept the existing plan, until it expires some two years hence. Besides, any posture adversary to Oregon and Washington would presumably defeat the jurisdiction of the district court.

> On the other hand, there are powerful arguments against this original suit. There *is* an existing settlement which ought not lightly be disturbed. We *do* have an obligation to the four Tribes on whose behalf we sought and obtained a judgment in the *Oregon* case. Also, if we were to intervene in the original action, it seems doubtful if we could prevent opening up to controversy the federal government's management of the off-shore fishery and our operation of the Columbia River dams — very complex and delicate issues. And, finally, we may question whether the Supreme Court is equipped to exercise the continuing jurisdiction necessary to enforce any judgment it may render. In sum, *the case is to be avoided, if, in conscience, that can be done.*[3] *(Emphasis added.)*

That document is attached in its entirety as Appendix C. The rationale of the United States represents a classic use of the concept of sovereign immunity to thwart meritorious litigation.

Idaho merely seeks the opportunity to present its claim before the Supreme Court. Obviously, before relief may be had, Idaho will have to substantiate its equitable entitlement to the satisfaction of the Court. If the United States has interests to protect, the federal government should protect those interests in court, not behind a cloak of immunity to the detriment of Idaho's constitutional right to adjudicate its grievance against the defendant states.

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[3]United States Government memorandum from Louis F. Claiborne to Wade H. McCree, Jr., (January 30, 1979). The Idaho Attorney General's office has been advised by the United States Department of Justice that, in quoting this document, it should be noted that the position of the United States is stated in its formal filings and not in preliminary papers.

C. Biological Concerns Are the Bases for Idaho's Action.

Although Idaho is an inland state, it maintains over 3,000 miles of quality anadromous fish habitat. Master's Report, 9. Most of this habitat is found in geographically isolated wilderness areas within the state. Despite the vastness of available habitat, Idaho's returning runs have significantly declined during recent years as a result of man's impact on these runs. By its complaint Idaho seeks equitable entitlement to an adequate spawning escapement and a reasonable sports fishery. Without such determination, Idaho has no guarantee that production efforts will ever enhance runs returning to its waters.

There is no doubt that Idaho salmon and steelhead suffer mortalities as a result of factors besides downriver harvest. The majority of such loss is caused by eight federal dams in their migratory path on the Columbia and Snake Rivers in Oregon and Washington. Idaho, located upstream from all eight dams, is subjected to the entire passage loss incurred during downstream and upstream migrations while the defendant states enjoy a harvest of Idaho-bound adult salmon and steelhead before the fish reach the first dam, Bonneville, on their return migration. Equitably, Idaho should not be forced to absorb the effects of passage loss as well as excessive downstream commercial and sport harvests.[4]

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[4]Exhibit W-3, *Columbia Basin Salmon and Steelhead Analysis,* Summary Report, Pacific Northwest Regional Commission (September, 1976) states at 15 that "[t]he once-productive upriver Spring Chinook run is in precarious condition." Exhibit W-3 further states that "[t]he condition of the Snake River segment [of summer chinook] is particularly precarious," and that "[b]oth segments of the upriver Summer Steelhead run are in serious trouble . . ." *Id.* at 17, 19.

Moreover, each major salmon and steelhead run which annu-

Evidence before the Court demonstrates that the United States has exercised *no* control over allocations of fishery resources among competing users in the Columbia River Basin.[5] For that reason, Idaho submits that the presence of the United States as a party is unnecessary and urges the Court to allow this case, where allocation is the issue, to proceed to trial.

SUMMARY OF ARGUMENT

This action is brought by the State of Idaho in order to protect a dwindling natural resource. Contrary to the report of the Special Master the relief sought by Idaho and its citizens can as a practical matter be granted.

The reliance of the Master upon the concept of sovereign immunity coupled with a strict interpretation of Fed. R.

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ally returns to the upper portion of the Columbia River Basin is currently being reviewed by the United States Department of Interior for possible classification as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531, et seq. See *A Question of Balance*, Summary Report, Pacific Northwest Regional Commission (November, 1978). (*A Question of Balance* was produced under grant agreement with but does not necessarily reflect the views of: Pacific Northwest Regional Commission, National Marine Fisheries Service, U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, and Columbia River Inter-Tribal Fish Commission.)

[5]Record, 221, 244; Exhibit W-4, at Q-1. Exhibit W-4, at Q-1 states: "The authority for management of fisheries and regulation of catch within the boundaries of Idaho, Oregon and Washington is invested in the states. Hatchery production of salmon and steelhead is dependent upon state approval. The federal government has no general fishery regulatory authority within the states, excepting situations which are provided for by treaties with Indian tribes or foreign nations, upon federal reservations which are not considered to be part of a state, or by special agreement or act. These exceptions appear to have relatively little effect on the fisheries management of the Columbia River. Problems with Indian fisheries stem from treaty interpretations and not from any particular federal managerial authority in fisheries.

Civ. P. 19 is contrary to basic concepts of federalism. The Master's recommendation, if upheld, will prevent the State of Idaho from resolving this dispute in the manner intended by the framers of the Constitution. Moreover, the residents of Idaho are denied their individual rights to assert their grievances through state government.

This entire constitutional conflict can be avoided by the Court recognizing that any specific interest of the United States can be adequately represented as *amicus curiae*.

Idaho asserts that the United States is a dispensable party to this litigation. The activities of the United States in the ocean, along the Columbia River and with the treaty fishermen are fixed. The United States is bound by statute and executive commitment to preserve the anadromous fishery. While limited participation of the United States would be desirable, this court has jurisdiction to bind the United States to previously committed obligations.

To the extent that the United States possess sovereign immunity regarding an aspect of this case, this court must narrowly construe this immunity and give great deference to the constitutional right of the State of Idaho to bring this action. The record in this case establishes that the position of the United States serves only to obfuscate the meritorious claim of Idaho. Moreover, the United States through legislation, commitments to the treaty Tribes and through agency activities has waived sovereign immunity.

The United States in dealing with the states and treaty Tribes has not acted in a vacuum. Contrary to the Master's Report the United States can be joined in this litigation to the extent necessary for this court to render a just adjudication of the issues presented.

EXCEPTIONS

I.

THE MASTER'S RELIANCE UPON THE CONCEPT OF SOVEREIGN IMMUNITY AND FED. R. CIV. P. 19 IS CONTRARY TO BASIC CONCEPTS OF FEDERALISM

Disputes among states involving natural resources and boundaries are as old as the federal system. The mechanism for resolution of disputes among states found in U.S. Const. art. III, § 2, Cl. 2 was a condition to the formation of the nation. Therefore, these disputes between former sovereigns are entitled to special constitutional significance.[6]

This action is brought by the State of Idaho as *parens patriae* on behalf of all citizens to protect a dwindling resource. Idaho's policy to protect these anadromous fish is expressed in both federal and state statutes.[7] The reliance by the Special Master upon the concept of sovereign immunity and Fed. R. Civ. P. 19 unnecessarily forecloses Idaho's right to participate in the federal system. Moreover, the right of Idaho's residents to enjoy and protect this unique resource is thereby barred.

The pertinent provision of art. III, § 2, Cl. 2 provides, "In all Cases affecting Ambassadors, other public Ministers and

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[6]Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States*, 46 (1904) quoting from *The St. Lawrence*, 1 Black 522, 526, 17 L. Ed. 180, 183 (1862) states, "the Court could not, consistently within its duty, refuse to exercise a power with which the constitution and law had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right."

[7]Idaho Code § 36-103 requires the State of Idaho to preserve and protect wildlife for the citizens of the state. *See Also* Appendix D.

Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction . . ."[8]

This constitutional grant of original jurisdiction is based upon strong policy considerations to insure that issues involving basic adjustments within the federal system will be heard by a tribunal having prestige commensurate with the status of the parties.[9]

It is Idaho's position that original jurisdiction actions are fundamental to constitutional government. Original jurisdiction instead of being a burdensome and archaic holdover of states' rights is an efficient mechanism for resolving disputes among states. Because of the important role given to original jurisdiction cases Idaho urges this Court to overrule the Special Master and find the United States a dispensable party to this litigation. Idaho further urges this Court to find that any interest the United States may have in this litigation is not protected by sovereign immunity and can be adequately represented by the United States as *amicus curiae.*

If unchanged, the report of the Special Master will encourage disharmony in the federal system not only among the three affected states, but also among other states which are now trying to resolve disputes through a diplomatic process. Moreover, individual citizens will be unable to assert their concerns through the mechanism of state govern-

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[8]U.S. Const. art. III, § 2. The implementing statute is 28 U.S.C. § 1251 (1952).

[9]Carson, the History of the Supreme Court of the United States, 174 (1902). "He [Chief Justice Jay] saw no incompatibility between suability and state sovereignty, and declared that as one state might sue another state in the Supreme Court, it was 'plain that no degredation to a state was thought to accompany her appearance in this Court.' "

ment. Without judicial resolution in this Court there will be little incentive to negotiate and this dispute between states will continue indefinitely.

A. Historically a Forum for Resolving State Disputes on the Merits Has Been Necessary for the Domestic Tranquillity.

In providing the Supreme Court with judicial power over controversies ". . . in which a state shall be a party . . ." U.S. Const. art. III, § 2, Cl. 2, the framers of the Constitution were establishing legal remedies necessary to create the nation. When the federal convention met in 1789 to draft the Constitution, the right of states to litigate disputes among themselves found in the Articles of Confederation was preserved. "This draft . . . as finally adopted took from the Senate the power to constitute a court to try disputes between the states respecting territory or jurisdiction . . . the entire jurisdiction of controversies between states was bestowed upon the Supreme Court . . ." *Missouri* v. *Illinois*, 180 U.S. 208, 223 (1900).

The reason art. III, § 2, Cl. 2 extends judicial power to controversies between states is, ". . . because domestic tranquillity requires that the contentions of states should be peaceably terminated by a common judiciary and, because in a free country justice ought not to depend on the *will of either of the litigants.*[10]

Supreme Court Rule 9 preserves the constitutional right of states to litigate through the Court's policy of flexible procedural requirements in original actions.

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[10]*Id.*, 126. (Emphasis added.)

B. Article III, Section 2, Clause 2 of the United States Constitution Must Be Construed in Light of the Basic Framework of the Federal System.

The purpose of the framers in providing for original and exclusive actions between the states was, as pointed out earlier, to provide a forum for resolving disputes among the states. Its function is to preserve the tranquillity between the states by allowing disputes to be resolved peaceably.[11]

The federal government is now attempting to use the sword of sovereign immunity to stop the State of Idaho from assuring a healthy return of anadromous fish in spite of the growing role of the United States as protector of the environment. This misuse of statutory policy has been addressed by Congress in eliminating sovereign immunity from agency actions contrary to the intent of law.

> As government programs grow, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of government officials becomes more and more important. Only if citizens are provided with access to judicial remedies against government officials and agencies will we realize a government truly under law.[12]

This recent growth in federal environmental regulations was not intended by Congress to disrupt the basic frame-

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[11]*See, Missouri* v. *Illinois*, 180 U.S. 208 (1900).

[12]H. R. Rep. No. 94-1656, 94 Cong., 2d Sess. represented in [1976] U.S. Code Cong. & Ad. News 6021, 6130 (hereafter "House Report"), explaining Congress' removal of the defense of sovereign immunity under 5 U.S.C., § 702.

work of the federal system.[13] In fact, many of the federal environmental statutes were designed to "conscript" state participation.[14]

Moreover, the use of these federal regulatory statutes to establish sovereign immunity for governmental actions creates a conflict between the constitutional right of states to bring original actions and the common law doctrine of sovereign immunity.

> . . . it suffices to point out that viewing sovereign immunity as a common law doctrine would effectuate the generally desirable result of leaving immunity as a question of policy, to be determined by Congress and adjusted to changing notions concerning the proper role of the doctrine.
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> Moreover, most commentators today are sharply critical of sovereign immunity and its persistence is often explained by the supposed constitutional compulsion behind the doctrine.[15]

This action presents a clear conflict between what remains of sovereign immunity and the constitutional right of Idaho to bring this action. As this Court has recently stated, "[t]he original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing and needs no legis-

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[13]In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) this Court reaffirmed the need for state governments to make decisions regarding conduct of internal governmental functions.

[14]Stewart, Richard B. *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L. J. 1196 (1977).

[15]*See*, Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 545, 546 (1977). This article contains an excellent discussion of the origins of sovereign immunity.

lative implementation." *California* v. *Arizona,* 59 L. Ed. 2d 144, 150 (1979).

The concept of immunity urged by the Master must give way to the explicit language of art. III. For, while ". . . some state governments may be ignorant or venal, many are far-seeing and courageous and not all wisdom reposes in Washington."[16]

The United States must not be allowed, through a tortured reliance on federal statutes and policies, to prevent the workings of the federal system.

II.

PARTICIPATION OF THE UNITED STATES AS *AMICUS CURIAE* CAN AVOID A GRAVE CONSTITUTIONAL CONFLICT

The conflict raised by the assertion of indispensability and sovereign immunity by the United States can be avoided by this Court. There is simply no specific interest of the United States asserted at this time which requires a finding of indispensability.

A. The Special Master Did Not Apply Supreme Court Rule 9 With the Procedural Flexibility Intended by the Supreme Court.

Rule 9 of the Supreme Court states in pertinent part, "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken *as a guide* to

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[16]Friendly, Judge, *Federalism: A Foreward*, 86 Yale L. J. 1019, 1034 (1977).

procedure in original actions in this court." (Emphasis added.)

When the Judiciary Act of 1789 authorized the Supreme Court to promulgate rules necessary for the conduct of business, the Supreme Court carefully reserved the right to deviate from the rules of procedure for original cases as the circumstances required. This flexibility is " . . . a distinctive feature of the procedure in original actions"[17] and has been preserved because of the constitutional significance of these actions to the federal system.

Such procedural flexibility is based upon three policy considerations, all of which favor the position Idaho is urging upon this Court. First, the goals of speedy and inexpensive determination of every action found in Fed. R. Civ. P. 1 are outweighed by the need to reach the merits, unaffected by procedural technicalities, in disputes involving quasi-sovereigns. Secondly, the uniqueness of original proceedings obviates the need for consideration regarding uniformity which is a foundation of the Federal Rules of Civil Procedure.[18] Finally, the states, in relinquishing their sovereign powers upon ratification of the Constitution, protected their right to settle disputes peaceably and on the merits.[19] "The 'highly important' dispute-settling power was vested in the National Supreme Court as to disputes which need litigating . . ."[20]

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[17]Comment, 11 Stan. L. Rev. 665, 686 (1959).

[18]*Id.*, 689.

[19]Beaver, *Common Law vs. International Law Adjudicative Rules in the Original Jurisdiction,* 20 Hastings L. J. 1, 3 (1968).

[20]*Id.*, 3, 4.

In applying these factors to the present litigation, the Special Master did not give adequate weight to the intent and purpose of Supreme Court Rule 9.

In sum, the purpose of Supreme Court Rule 9 is to resolve disputes in an efficient manner. The federal rules are at best only a useful and convenient guide in original proceedings. Because the federal rules were not intended for disputes among states, their technical application by the Special Master is improper and will only exacerbate relations between the states.

B. The Interests of the United States Can Be Adequately Presented as *Amicus Curiae* to the Court.

The vague assertions of the United States concerning indispensability and sovereign immunity can be protected by flexible application of the criteria and policies behind Rule 9 of the Supreme Court Rules.[21]

Even though the United States has taken no harmful action and Idaho has no cause of action against the United States or its trustees at this time, the Special Master concludes that the United States is indispensable. This conclusion has turned Fed. R. Civ. P. 19 into a guideline which fits no procedural situation.

Any speculative injury or interest presented by the United States can adequately and completely be presented to this Court as *amicus curiae*. In fact, once the trial on the merits has begun, the United States can serve a valuable role in assisting the Master by pointing out wherever the

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[21]Additionally, as pointed out in Argument III, the assertions of the United States do not satisfy Fed. R. Civ. P. 19.

issues being litigated affect the interest of the United States. Once these specific interests are identified the United States can be made a limited party. Precedent exists for such procedure.

In *Florida* v. *Georgia*, 17 How. 478, 493-496 (1894) the Court allowed the United States to file its proofs without becoming a party and also without the right to interfere in the pleadings and evidence presented by the states.[22] Under the procedure in *Florida*, the constitutional right of the states to an adjudication on the merits is vindicated while the United States is protected against any potential liability.[23]

This type of procedure preserves to the greatest extent possible the ability of the states to resolve disputes before the Court while avoiding the complex problems inherent in the growing regulation of natural resources by the federal government. If the Special Master's broad interpretation of indispensability is allowed to stand the federal government will be able to veto disputes between states without becoming accountable for its actions. This situation will become highly disruptive to the federal system and further reduce the role of the states as sovereigns.

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[22] *See also*, Harlan, J. dissenting, *California* v. *Southern Pacific Co.*, 157 U.S. 229, 262-271 (1895).

[23] In language particularly appropriate to this action the Court stated the policy behind original actions. "And it became, therefore, the duty of the Court to mold its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred." *Florida*, at 189.

III.

THE STATE OF IDAHO TAKES EXCEPTION TO THE SPECIAL MASTER'S FINDING THAT THE UNITED STATES IS AN INDISPENSABLE PARTY BECAUSE OF THE ACTIVITIES OF ITS AGENCIES AND BECAUSE OF ITS STATUS AS TRUSTEE FOR THE COLUMBIA RIVER TREATY INDIAN FISHERMEN

The Special Master concluded that the United States was an indispensable party to the instant action under the framework of Fed. R. Civ. P. 19. That determination was based on two findings. First, the Master found federal agencies are so involved in the management, protection and preservation of the anadromous fish resource that no decree allocating the resource among the states can adequately protect or determine each state's interest without the United States becoming a party. Master's Report, 4, 19, 22, 28. Second, it was determined that treaty Indians must be made parties so the decree can be enforced against them. Master's Report, 20, 28.

In applying Fed. R. Civ. P. 19 the Special Master has used a formalistic and rigid approach to the indispensability issue. This is contrary to the policy of the Federal Rules of Civil Procedure in general and Fed. R. Civ. P. 19 in particular. A pragmatic approach, looking at all of the particular facts and circumstances, should have been utilized in determining whether the instant case can proceed to adjudication in the absence of the United States as a party.[24]

[24]Notes of Advisory Committee on 1966 Amendments to Rules, Rule 19, 28 U.S.C. at 420.

A. The Special Master's Finding That Any Judgment Rendered by This Court Must Account for Every Possible Contingency is in Error.

Having concluded that joinder of the United States is necessary, the Special Master set forth the four criteria in Fed. R. Civ. P. 19(b) for the determination of whether to proceed or dismiss a case because of the absence of an interested person. Master's Report, 18. The first two criteria deal with the potential for prejudice to a non-party and the extent to which protective provisions are necessary to protect an absent person's interests. The Special Master concludes that no prejudice will occur if a decree is rendered in the absence of the United States as a party. Consequently, the first two criteria do not require the United States' presence as a party to the case at bar. Master's Report, 19.

The third criteria, whether a judgment rendered in the absence of a non-joined party will be adequate, is the basis upon which the Special Master recommends dismissal for failure to join an indispensable party. Master's Report, 22. The Special Master is concerned that the interrelation between the treaty fisheries, non-treaty fisheries, flow regimes, operation of fish passage facilities, programs of the federal agencies and control over the ocean catch exercised by a federal statute[25] cannot be provided for in a decree

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[25]The federal statute controlling ocean harvest is the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882.

With regard to anadromous fish the purpose of this Act is to conserve and manage the resource while in the ocean. 16 U.S.C. § 1801 (b) (1). Under the Act, the Pacific Fishery Management Council was established. 16 U.S.C. § 1852 (a). It is the council's function to prepare and continually review the regional fishery

with the parties now before the Court. Accordingly, the Special Master found that no decree is adequate if it does not address or control *all* interrelated factors. Master's Report, 20.

Idaho contends that all of these factors need not be addressed in order for an adequate decree to be had. The question is not whether all of the interrelated rights and duties of "interested" persons can be controlled, but whether control can be had over those which deal with the present inequitable allocation so that adequate relief to Idaho can be provided. Rarely can all interrelated factors be brought under the control of a problem solver so that the desired resolution is 100% certain. This general proposition is also true of the judicial resolution of legal problems. The courts cannot concern themselves with *everything* that might operate to thwart the desired effect of a decision. To do so would make litigation overly cumbersome, or, as in the instant case, an outright impossibility.

Although the United States is conceivably a "person to be joined if feasible," an application of the particular facts and circumstances of this case to Fed. R. Civ. P. 19 does not establish the need for dismissal. The policy underlying Fed. R. Civ. P. 19(b) is to settle disputes "in wholes" *whenever possible,* not to settle disputes in wholes or *not at all.* The Supreme Court has stated, ". . . there was no reason to

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management plan. 16 U.S.C. § 1852 (h). Idaho, Oregon and Washington are each represented by voting members of the Pacific Fishery Management Council and are directly involved in the decision-making process regarding ocean management under the Act. 16 U.S.C. § 1852 (b). Therefore, the defendant states should not be seen to assert federal indispensability concerning ocean management when they are in fact a voting voice in the establishment of off-shore harvest regulations under the federal statute.

throw away a valid judgment just because it did not *theoretically* settle the whole controversy." *Provident Bank & Trust* v. *Patterson,* 390 U.S. 102, 116 (1968). (Emphasis added.) Likewise, in the instant case, there is no reason to throw away the entire action because it does not *theoretically* settle the whole controversy.

However, the Special Master concluded that:

> A balancing of the Rule 19(b) factors shows on one side of the scale that non-joinder will result in no prejudice to the absent party and that Idaho has no adequate legal remedy. On the other side, the absence of the United States makes the entry of an adequate judgment impossible and tips the scales in favor of the conclusion that the United States is an indispensable party without which the action may not proceed. Master's Report, 22.

Idaho objects to that conclusion and submits that its litigation should not be dismissed because of an inability to resolve every conceivable issue in the absence of the United States.

B. The United States Is Not an Indispensable Party Because of the Activities of Its Various Agencies.

In asserting that the presence of the United States is necessary to give the Court jurisdiction over a number of possible problems, the Special Master raises issues which are not presented by Idaho. Idaho agrees that many of the problems facing management of anadromous fish resources are not solvable by judicial action. These kinds of problems are inappropriate for judicial resolution and need not be addressed in order to grant adequate relief in this case.

The legal controversy in the case at bar *should be limited* to determining the equitable allocation of certain upstream

anadromous fish runs among the Idaho, Oregon and Washington fisheries. Other related factors such as management of the ocean harvest, operation of the dams, and land management *are not material* to the issue of equitable apportionment. Federal involvement in these areas bears no relationship to the issue of whether the defendant states may continue to harvest these returning stocks of anadromous fish without consideration of Idaho's equities.

The inequity to Idaho occurs when these fish have reentered the Columbia River as adults. For that reason, downstream mortalities of juveniles are immaterial to the issue of allocation because only *adults* on their return migrations are harvested in the lower Columbia River commercial and sport fisheries. Most non-Indian harvests of adults on the mainstream Columbia occur in the waters below Bonneville Dam before these fish are subjected to any dam-caused mortalities on their upstream migration. These harvests are regulated at the discretion of the Columbia River Fish Compact agencies. The defendants should be required to consider such "after-their-harvest" losses of adults during upstream passage as a responsibility to be shared with Idaho, rather than to consider those fish "wasted."

Factors affecting the total supply of the resource do not necessarily concern the issue of how the available supply should be allocated among those claiming an interest in it. Because variables affect any natural resource, Idaho does not (and cannot practicably) claim an interest in a fixed number of anadromous fish requiring that all related matters *must* be brought under a Court decree to insure the requisite supply. To illustrate, if the long term and total

supply of water were an issue in water rights litigation, federal and state agencies would be "indispensable parties" in all such adjudications.

Federal agencies make decisions impacting on the anadromous fish resource. However, Idaho has no grievance against the federal government. The United States is committed to promoting and maintaining wildlife resources affected by the construction and maintenance of federal dams, power plants, reservoirs and the management of its land holdings. A list of major federal statutes which commit the United States to a policy of conserving, enhancing and protecting fish and wildlife resources is attached to this brief as Appendix D. The evidence demonstrates that federal agencies are active partners in programs to insure the continuance of the fish runs. The United States cannot reverse these statutory policies arbitrarily and still assert sovereign immunity.

Finally, it must be emphasized again that the United States has not exercised any control over allocations of fishery resources among competing users in the Columbia River Basin. The record clearly substantiates this point.[26] The rights and duties of the United States are fixed by federal statute and regulation. The allocation of fish resources in the Columbia River is not one of those rights or duties. Management of federal works projects, federal lands, or the ocean fishery is not a mechanism by which the United States can regulate the in-river harvest of anadromous fish. The rights, duties and responsibilities of the United States in this case *are not* as clear cut as those present in *Arizona* v. *California*, 298 U.S. 558, 571 (1936).

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[26]Record, 221, 244; Exhibit W-4 at Q-1.

The Supreme Court decision in *Nebraska* v. *Wyoming*, 295 U.S. 40, 42-43 (1935) is clearly more analogous since the states may allocate a fishery within their jurisdictions much the same way as Wyoming and Nebraska could allocate water resources within their jurisdictions. In the instant case the United States should be held dispensable because of the activities of its agencies for the same reasons as were set forth in *Nebraska*.[27]

C. The Master's Finding That the United States Is an Indispensable Party Because of Its Status As Trustee for the Columbia River Treaty Indian Fishermen is in Error.

The Warm Springs, Umatilla, Yakima and Nez Perce Tribes have treaty-secured fishing rights on the lower Columbia River. Master's Report, 5. The District Court of Oregon held in *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969), *aff'd and remanded,* 529 F. 2d 570 (9th Cir. 1976) that fishermen from these tribes are entitled to the opportunity to take 50% of the harvest of upriver anadromous fish, (Master's Report, 12) and that case is presently pending under a five-year settlement agreement. Master's Report, 5.

The Special Master found there is no assurance that increased numbers of fish will reach Idaho waters and that therefore the relief requested will be inadequate under Fed. R. Civ. P. 19. Master's Report, 20. That finding is premised on three inter-related assumptions. First, that the treaty Indians will over-harvest the increased number of fish passing their fishing stations in violation of the settlement

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[27]Report of Special Master, 23, Cf. Texas v. Mexico 352 U.S. 991 (1954).

agreement reached in *Sohappy* v. *Smith*, and consequently deny Idaho any benefit of increased escapements. Second, that Oregon and Washington as parties to that agreement will not enforce its terms against the Indians. Finally, that Idaho has no means of enforcing the agreement against the treaty Indians. These assumptions are problematic. The reliance on these assumptions as a bar to adjudication of this case on the merits is contrary to the pragmatic policy of Fed. R. Civ. P. 19 (b). Here, the Special Master should have assessed the probability that these assumed events will come to pass. If substantive reasons deny the existence of any *one* of the three assumptions, then the question of adequacy of relief must be resolved in favor of Idaho.

No determinative evidence was presented that the treaty Indian fishery will act in bad faith and overharvest the fish runs. The Tribes are bound by court decree in *Sohappy* v. *Smith* to a fixed percentage of fish available for harvest. In the event that the existing settlement agreement in the *Sohappy* case is not extended beyond its term, the Tribes will be bound by the court decree providing opportunity to take 50% of the harvest. Therefore, the United States will be obliged to compel Tribal adherence to the court orders.

If for the purposes of argument one assumes that the treaty Indians were to overfish, the result would be contrary to the interests of Oregon and Washington because of disruption of existing harvest quotas under the *Sohappy* settlement agreement. Since a treaty Indian over-harvest poses a definite detriment to non-Indian fishermen, how can the Court assume that Oregon and Washington will not act to protect their interests? Because Oregon and Washington are in a court in which the treaty Indians have waived sovereign

immunity by suing the states, the defendant states are in a position to protect their rights under both the *Sohappy* settlement agreement and whatever equitable apportionment is arrived at by the Supreme Court in the instant case.

Finally, should all parties to *Sohappy* v. *Smith* fail to comply with the court sanctioned agreement, a third remedy exists. Idaho may seek intervention under Fed. R. Civ. P. 24 to compel adherence to the agreement's terms.

Idaho does not dispute the Indian allocation of the anadromous fishery established by the federal court. However, the settlement agreement not only secures to the Indian treaty fishermen a share of the fish, but also secures a share to non-treaty fishermen. Idaho is asserting its interest only in the non-treaty share and submits that the non-treaty share can be allocated among Oregon, Washington and Idaho without adversely affecting the Indians' share.

If non-Indian fishing below Bonneville Dam is restricted in the instant litigation, more fish will pass Bonneville and will be available for the Indians to more easily fill their quotas under the decree and settlement agreement in the *Sohappy* case. This can only benefit the Indian fishery by giving the treaty fishermen a greater opportunity to harvest their allotted share. A person's interest must be adversely affected by a decree rendered in his absence before he can be found indispensable. If the effect is beneficial, then that person is dispensable.

After reviewing Idaho's position, the Master found that:

> Idaho accepts these decisions [regarding treaty fishing rights on the lower Columbia River] and makes no complaint against the operation by the United States of the dams which affect both the downstream and upstream

> runs of fish. In the circumstances, *the rights of the United States will not be prejudiced if the action proceeds, and no protective provisions in the decree will be required.* Master's Report, 19. (Emphasis added.)

Since the Master has found that no prejudice will befall the Tribes, or the United States as their trustee, Idaho submits the United States is a *dispensable party* to this litigation. Because the United States will not be prejudiced if the action proceeds, the Court should not dismiss the present action without providing the opportunity for full development of facts and evidence at trial regarding the adequacy of judgment in the instant proceeding.

The Court must consider and balance the two possible results that a determination of the issue of indispensability will entail. If the Court decides that the United States is dispensable, Idaho can gain adequate protection for its interests in the anadromous fish runs. Moreover, Idaho will have the leverage necessary to achieve its ends through ". . . mutual accommodation and expert administration, not litigation" as the Special Master suggests. Master's Report, 24. Without this leverage Idaho has no chance of obtaining an equitable share of the fish through "mutual accommodation."

IV.

THE DOCTRINE OF SOVEREIGN IMMUNITY MUST BE NARROWLY CONSTRUED IN ORIGINAL AND EXCLUSIVE ACTIONS BETWEEN STATES

Over the last twenty five years there has been a growing recognition of the inappropriateness of the doctrine of sovereign immunity in a democratic society. The sovereign immunity concept is rapidly being replaced by a concept of

sovereign responsibility.[28] The reasons for this shift of policy are rooted in the structures of the American society. "It must be borne in mind that the sovereign immunity doctrine became established about one hundred years ago, long before the modern law of judicial review had developed."[29]

Modern concepts of government require this Court to retreat from the last bastion of sovereign immunity -- the original and exclusive action.

A. The Assertion of Sovereign Immunity by the Federal Government Serves Only To Obfuscate the Issues Presented In This Case.

It is difficult to understand why the government in its role as protector of the anadromous fisheries[30] should desire or have the ability to obstruct Idaho's litigation. The rationale is found in the origin of the concept of sovereign immunity. In reviewing that concept, Congress stated:

> The doctrine of sovereign immunity probably descended from the tenet of medieval English law that the "King can do no wrong." Yet even today, 200 years after the American revolution, the doctrine stands as a barrier to the redress of just grievances against the United States Government. To the extent that this obsolete immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsive Government.[31]

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[28]2 Davis, Administrative Law Treatise, § 17.01 at 491, 492 (1958).

[29]Cromton, Roger C. *Non-statutory Review of Federal Administrative Action: the Need For Statutory Reforms of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. R. 387, 425 (1970) (hereafter "Cromton").

[30]See Appendix D.

[31]S. Rep. No. 94-996, 94 Cong. 2d Sess. 3 (1976) (hereafter "Senate Report").

Thus, the doctrine of ". . . sovereign immunity has been largely crumbling, and today only remnants remain."[32]

The United States in this action has asserted the doctrine of sovereign immunity in its most elemental form.

> The United States submits that it is an indispensable party to this action and that this Court cannot grant complete relief in its absence. The United States contends that the complaint of the State of Idaho therefore must be dismissed. Memorandum of United States as Amicus Curiae dated April 6, 1978, at 5.

The report of the Master essentially agrees with this position and concludes; "agencies of the United States control the spills, the states do not; they can only request." Master's Report, 24.

This assertion of sovereign immunity is in error and serves only to allow the executive branch to thwart meritorious litigation.

Reliance upon sovereign immunity has created a confusing and artificial state in the law which results in unjust results and wasted effort.

> The doctrine of sovereign immunity fulfills these unpleasant expectations by distracting attention from the real issues of whether judicial review or specific relief should be available in a particular situation and by directing attention to the *sophistries*, false pretenses, and unreality of present law.[33]

Congress has moved to eliminate the vitality of this concept of immunity.

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[32]2 Davis, Administrative Law Treatise § 17.01 at 492 (1958).

[33]Cromton at 420. The author further decries, "The litigating practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year.

B. The United States Has Waived Its Sovereign Immunity To Suits Seeking To Protect Anadromous Fish.

It is important to note that the United States in asserting sovereign immunity to the instant action failed to explore the extent of the alleged immunity. Idaho's position is that the United States has waived sovereign immunity in this action. The United States has for the most part acted in Idaho's interest and because of this is a dispensable party.

The Master found, however, that the United States was indispensable because of (1) the operation of the eight dams on the Columbia and Snake Rivers, (2) the management of the off-shore fishery, and (3) the Indian treaty rights. Master's Report, 17, 19, 24. A look at each of these areas of indispensability reveals that the United States has either waived sovereign immunity by statute or does not possess sovereign immunity.

1. The Administrative Procedures Act, 5 U.S.C. § 702 (1976) Specifically Waives The Sovereign Immunity of The United States.

In 1976 Congress amended the Administrative Procedures Act, 5 U.S.C. § 551, et seq. (1976) to specifically waive the sovereign immunity of the United States for,

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof *acted* or *failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. 5 U.S.C. § 702.

The purpose of this amendment was expressed by the Department of Justice in the following comments on the proposed bill:

> Indeed, if the present bill is properly understood and properly applied by the courts, it is likely to produce a more stable and predictable system of immunity from suit than the present doctrine . . . because it will be a system directly and honestly based upon relevant governmental factors rather than upon a medieval concept whose real vitality is long since gone and which we have tried vainly to convert to rational modern use.[34]

The Department of Justice went on to state that the intent of the drafters of the bill was to have cases disposed of upon their merits or upon more substantial legal grounds.

> To the contrary, one of the very premises of the proposal is the fact that many (indeed, I would say most) of the cases disposed of on the basis of sovereign immunity could have been decided the same way on other legal grounds, such as: lack of standing; lack of ripeness . . . .[35]

Thus, the purpose of this legislation was to remove the defense of sovereign immunity as a bar to judicial review of federal administrative action.

The present action is precisely the type of federal action intended by Congress to be judicially reviewed. *SCM Corp.* v. *United States,* 450 F. Supp. 1178 (Cust Ct. 1978).

This clear unequivocal waiver of immunity, coupled with the many environmental statutes [36] which require the federal government to preserve and protect the anadromous

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[34]Senate Report, 25.

[35]*Id.*, 26. Other defenses mentioned by the Department of Justice are ripeness, availability of an adequate remedy in other court, statutory preclusion of judicial review, commission of matter to agency discretion, privilege, exhaustion, and political question doctrine. At 25-26.

[36]Appendix D to this brief contains a listing of some of the statutes which require the federal government to preserve and protect the anadromous fishery.

fishery resources, eliminates the sovereign immunity of the United States in this case.

In fact, this Court recently held that a similar waiver of sovereign immunity in quiet title actions against the federal government, 28 U.S.C. § 2409 (a) (1976) applied to all federal courts including the United States Supreme Court in its exercise of original and exclusive jurisdiction. *California* v. *Arizona*, 59 L. Ed. 2d 144 (1979).

In light of these provisions and other specific statutes a closer look at the Master's ruling reveals that there are no grounds for the alleged sovereign immunity of the United States.

2. The United States Is Not Protected By the Doctrine of Sovereign Immunity in Operation of the Dams or in Management of the Ocean Fishery.

As pointed out earlier the United States is committed by statute to protecting and maintaining wildlife resources affected by the construction and maintenance of federal dams, power plants, reservoirs, and the management of its land holdings. Contrary to the Special Master's assertions, these commitments do not allow the federal government to operate these facilities as it pleases.[37] In fact such commitments allow the State of Idaho and private citizens to sue the United States for actions contrary to sound management. These statutes in fact waive sovereign immunity of the United States.

To the extent these federal environmental statutes do not waive sovereign immunity, Section 702 of the Administra-

[37]Master's Report, 24.

tive Procedures Act does. In fact, this statute was designed to make older executive departments subject to suit.

> Unfortunately, these special statutes do not cover many of the functions performed by the older executive departments, such as the Department of State, Defense, Treasury, Justice, Interior, and Agriculture. In these instances judicial review is available, if at all, through actions involving matters which arise "under the *Constitution, laws,* or *treaties* of the United States" as provided in Section 1331 of Title 28.[38] (Emphasis in original.)

The United States cannot arbitrarily reverse its policies protecting the anadromous fishery resource without liability under these statutes.

3. The United States Government Does Not Possess Sovereign Immunity Due to its Role as Trustee for the Tribes.

The final assertion by the Special Master is that the United States is an indispensable party to this litigation because of its role as trustee to the Indian tribes. The Master concludes that since the United States possesses sovereign immunity, Idaho's action must be dismissed. Master's Report, 22.

This analysis places the United States in a position of unaccountability for its actions. That position is erroneous.

The United States and the trustee Indian Tribes do not act in a vacuum. The *Sohappy* v. *Smith* settlement agreement, to which the United States, the Indian Tribes and the States of Oregon and Washington are parties, creates duties and liabilities upon those parties.[39]

[38]House Report, 6125.

[39]The settlement agreement is attached as Appendix A.

In *Sohappy* v. *Smith,* 302 F. Supp. 899 (D. Ore. 1969) the lower river Tribes sued to, " . . .[s] eek a decree of this court defining their treaty right 'of taking fish at all usual and accustomed places on the Columbia River . . . ' and the manner and extent the State of Oregon may regulate Indian fishing." *Sohappy*, 903. The United States in that action explicitly recognized " . . . [t]he need for regulation of Indian commercial fishing on the Columbia River to protect fish stocks." *Sohappy*, 906. The decision of the court resulted on February 8, 1977, in a court order adopting the settlement agreement.

This agreement creates limitations upon the United States and Indian Tribes to " . . . maintain, perpetuate and enhance anadromous fish and other fish stock originating in the Columbia River . . . ."[40] The agreement recognizes that there has been " . . . a continual decline of some runs of anadromous fish in the Columbia River system."[41]

Besides broad general statements of intent, the *Sohappy* settlement agreement contains specific allocations of fish available for harvest which binds all parties.

The take of fall chinook salmon, spring chinook salmon and summer steelhead are specifically limited.[42] These limitations bind all the signatories and, contrary to the Master's Report, are binding obligations upon the United States.

The United States does not possess sovereign immunity to ignore this agreement and its goals. The United States is

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[40]Appendix A at A-1.
[41]Appendix A at A-2.
[42]Appendix A at A-3.

bound by court order to comply. Should the Department of the Interior fail to compel tribal adherence with the *Sohappy* settlement agreement, Idaho can seek intervention under Fed. R. Civ. P. 24 to compel enforcement of its terms. This intervention would be only to enforce the agreement and not for the purpose of apportionment of the fish runs between the Indian Tribes, Oregon, and Washington.

It is clear that Idaho possesses a " . . . claim or interest relating to the property or transaction which is the subject of the action . . . ." Fed. R. Civ. P. 24 (a) (2). Since Idaho would be disadvantaged by the acts of the United States, Idaho would be ". . . so situated that disposition of the action may *as a practical matter* impair or impede his ability to protect that interest . . . ." (Emphasis added.) Fed. R. Civ. P. 24 (a) (2). Any refusal of the United States to enforce that agreement would clearly give an injured party a right to intervene. *Smuck* v. *Hobson*, 408 F. 2d 175, 179, 180 (D.C. Cir. 1969).

Moreover, the United States can be subjected to the jurisdiction of the Court if the Department of the Interior or any officer fails to act to enforce the *Sohappy* agreement.[43] As pointed out earlier, the United States simply does not possess sovereign immunity to violate the laws of Congress.[44]

The Indian Tribes themselves are not without enforceable obligations. In entering into the settlement agreement

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[43]5 U.S.C. § 702 (1976). This is precisely the type of agency action which Congress sought to have reviewed by courts. No conceivable governmental policy can be forwarded by allowing the United States to refuse to comply with its obligations.

[44]Appendix D contains a listing of statutes which effectively waive the sovereign immunity of the United States.

and protracted litigation with Oregon and Washington, the Indian tribes have waived whatever sovereign immunity they may have possessed.[45]

To the extent necessary to fashion a decree in this action there is no tribal immunity from suit. Individual members of the Indian Tribes have no immunity for violations of the agreement. *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 167 (1977). While wholesale violations of the *Sohappy* agreement by the Tribes should not be presumed, those violations could be reviewed. The Indian Tribes simply do not have sovereign immunity to do as they please. "No such fair apportionment could be effective if the Indians received the power to take an unlimited number of anadromous fish within the reservation." *Puyallup*, at 175.

In an earlier decision this Court placed the issue in clear perspective.

> Rights can be controlled by the need to conserve a species; . . . the police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon and the treaty does not give the Indians a federal *right to pursue the last living steelhead until it enters their nests. Washington Game Dept.* v. *Puyallup Tribe,* 414 U.S. 44, 49 (1973) (Emphasis added.)

Any decree rendered by the Supreme Court allocating fish to the State of Idaho can be enforced against the United States, Indian Tribes and members to the extent their ac-

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[45]The extent of Tribal sovereign immunity is even more vague and complex than that of the United States. Idaho agrees with Justice Blackman's concurring opinion in *Puyallup Tribe* v. *Department of Game of Washington,* 433 U.S. 165, 178 (1977). "I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 54 L. Ed. 894 (1940).

tions violate the *Sohappy* settlement agreement. Idaho does not seek to disrupt the agreement. Idaho will, however, seek to guarantee its enforcement if necessary.

C. Contrary To the Master's Conclusion the United States, If Necessary For Relief, Can Be Brought Before This Court.

This analysis of the doctrine of sovereign immunity establishes that the United States has not acted in a vacuum in its dealings with the states and Indian Tribes. The United States through Acts of Congress and the executive branch has waived any sovereign immunity it may have possessed.

Contrary to the Master's conclusion, the United States can be joined to the extent necessary for this Court to achieve a just adjudication of the issues presented.

V.

IDAHO'S PURSUIT OF EQUITABLE DIVISION OF THE NON-INDIAN ANADROMOUS FISHERY IS SUSCEPTIBLE TO JUDICIAL DETERMINATION AND ENFORCEMENT WHICH WILL NOT BE UNDULY BURDENSOME TO THE COURT

Again the Special Master has stated that the Court uniformly adheres to a policy of allowing full development of facts in original actions. Master's Report, 16-17. Idaho submits that a complete hearing upon the merits in the instant case would result in a judicial decree which could allocate the existing non-Indian fishery without disturbing the treaty secured and court allocated Indian fishing rights on the Lower Columbia River. To the extent that the United States has a qualifiable interest, it can be protected by participating as *amicus curiae* or being joined as a party.

Idaho submits further that the Court should hear the full development of facts before determining the feasibility of judicial resolution. Accordingly, Idaho takes exception to the Special Master's finding that, "[a]ny decree in this case for an apportionment will require constant supervision and the exercise of continuing jurisdiction." Master's Report, 21. Such a finding was based upon reasoning that the court in *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969) found continuing jurisdiction necessary. In the instant litigation, any finding of need for continuing jurisdiction presupposes the bad faith of the defendant states and should await a full hearing on the merits.

If necessary, the Court could follow a practice it has used in the past regarding retention of jurisdiction to allow the parties to apply for later relief, such as modification or enforcement of a decree. *See Wisconsin* v. *Illinois*, 28 U.S. 696 (1930); *New Jersey* v. *New York*, 282 U.S. 336 (1931); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922). Idaho does not deny that subsequent modification of any decree herein may be necessary as the equities of production, passage mortalities, run size and harvest change. However, Idaho contends that a daily requirement of continuing jurisdiction will be unnecessary. In the event said conditions change beyond those contemplated in the original decree, modification under the retained jursidiction of the Court would be appropriate.[46]

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[46]The mere fact that a decree may be burdensome does not justify refusal by this Court to hear Idaho's claim. "But the efforts at settlement in this case have failed. A genuine controversy exists, the gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution. *Nebraska* v. *Wyoming*, 325 U.S. 589, 617 (1944).

VI.

THE ALTERNATIVE OF MUTUAL ACCOMODATION AND EXPERT ADMINISTRATION IS NOT PRESENTLY AVAILABLE IN THE CASE AT BAR

The Special Master concludes that the solution to all issues presented is mutual accommodation and expert administration. Master's Report, 24. Idaho does not dispute this conclusion, but asserts that it is the role of the judiciary to resolve conflicts between parties when settlement cannot be reached.

For years Idaho has sought admittance into the Oregon-Washington Columbia River Fish Compact, only to be rebuffed. This compact was established in 1918 to promulgate regulations based upon the mutual consent of the defendant states regarding the take of fish in the Columbia River, a substantial portion of which are Idaho bound. As the Special Master stated, "Idaho was not a party to the compact and its efforts to become a party have failed." Master's Report, 6. Furthermore, efforts to settle the present litigation have proved fruitless. As a consequence, Idaho continues to seek resolution of this controversy in the only available forum, the United States Supreme Court.

If mutual accommodation and expert administration existed, Idaho would have no need to be before the Court. The difficulty of achieving relief through accommodation with the defendant states and the tribes is evidenced by the similar frustration of the Department of Justice shown in Appendix C. Since the United States was unable to gain compromise under threat of intervention, it will be impossible for Idaho under dismissal without prejudice.

Idaho contends its downstream neighbors continue to harvest the upriver runs of anadromous fish without proper consideration of the spawning escapement and fishery needs of Idaho. Idaho takes exception to the Special Master's finding that: "[t]he preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and philosophical conflicts not solvable by judicial action." Master's Report, 24. The *preservation* of Idaho's anadromous fish runs can only be secured by an equitable *apportionment* of the resource, downstream. The issue is of great importance and its complexity should present no bar to judicial resolution. Idaho submits the Court should allow full presentation of the evidence on the merits.

CONCLUSION

For the above reasons Idaho urges this Court to find that the United States is a dispensable party to this litigation and that any interest of the United States can be protected by participating as *amicus curiae* or by joinder for a limited purpose.

Only strong judicial initiative can resolve this dispute and prevent the inevitable diminution of Idaho's anadromous fish runs.

DATED this 1st day of May, 1979.

DAVID H. LEROY
ATTORNEY GENERAL
STATE OF IDAHO
W. HUGH O'RIORDAN
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES
DIVISION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 1979, three copies of PLAINTIFF'S EXCEPTIONS TO REPORT AND SUPPLEMENTAL REPORT OF THE SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO were mailed, postage prepaid, to:

DIXY LEE RAY
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OFFICE OF THE GOVERNOR
Olympia, Washington 98504

SLADE GORTON
ATTORNEY GENERAL
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and further that all parties required to be served were served.

DAVID H. LEROY
ATTORNEY GENERAL
State of Idaho

(Appendix Follows)

APPENDIX

APPENDIX A

A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM

The purpose of the plan shall be to maintain, perpetuate and enhance anadromous fish and other fish stocks originating in the Columbia River and tributaries above Bonneville Dam for the benefit of present and future generations, and to insure that the Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called Tribes, having the right to fish based on a treaty with the United States are accorded the opportunity for their fair share of harvest, and to provide for a fair share of the harvest by nontreaty user groups.

This plan is based upon the unique circumstances relating to the Columbia River system and the parties hereto and does not necessarily have application in other fisheries.

The parties also recognize the substantial management problems resulting from the ocean harvest of mixed stocks of anadromous fish originating from the upper Columbia River and its tributaries and the wastage resulting from fishing on immature stocks.

The parties will continue joint efforts to collect and gather data on this fishery and to reduce inefficient and wasteful harvest methods.

Due to environmental factors totally unrelated to the treaty or nontreaty fisheries, there has been a continual decline

of some runs of anadromous fish in the Columbia River system. This trend could deprive not only the treaty Indians, but also other user groups of the opportunity to harvest anadromous fish. The parties pledge to work cooperatively to maintain the present production of each run, rehabilitate runs to their maximum potential and to work towards the enhancement and development of larger and additional runs where biologically and economically feasible.

(1) The managing fishery agencies shall make every effort to allocate the available harvest as prescribed in this agreement on an annual basis. However, because run size cannot always be accurately calculated until some lower fishery has taken place, annual adjustment of the sharing formulas for each species may be required to provide the appropriate shares between treaty and nontreaty users. If treaty and nontreaty users are not provided the opportunity to harvest their fair share of any given run as provided for in this plan, every effort shall be made to make up such deficiencies during the next succeeding run of the same race. Overall adjustments shall be made within a 5-year time frame.

(2) The treaty Indian tribes and state and federal agencies shall diligently pursue and promote through cooperative efforts the upriver maintenance and enhancement of fish habitat and hatchery rearing programs, and so far as practicable, maintain present production of each run and to rehabilitate runs to their maximum potential.

(3) Hatchery salmon and steelhead released to maintain or restore runs above Bonneville Dam shall be shared pursuant to this plan.

(4) A technical advisory committee shall be established to develop and analyze data pertinent to this agreement, in-

cluding but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catch allocation and adjustments, dam loss, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the managing fishery agencies to assure that the allocations in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems on the Columbia River. The committee shall be comprised of representatives named by each of the three states, Oregon, Washington, Idaho, National Marine Fisheries Service, U.S. Fish and Wildlife Service and each of the Indian Tribes.

(5) Each party shall develop a catch record program that utilizes reliable statistical methods and effective enforcement procedures as developed by the committee. Indian tribes shall report on appropriate state forms for each species ceremonial, subsistence and any other catch not sold to state-licensed buyers. The states shall report and make available to all interested parties treaty and nontreaty sport and commercial catch for each species. All the above reports shall be made within an agreed-upon time schedule.

(6) The states agree to enact or recommend for enactment by the Pacific Fisheries Management Council appropriate conservation regulations for the ocean fishery that will assure an efficient utilization of stocks and will provide for adequate escapement of mature fish into the Columbia River to achieve the goals and purposes of this plan. Marine regulations should attempt to harvest mature fish and reduce waste.

(7) Fish escapement totals, dam loss estimates, or other technical aspects of this agreement may be modified by

mutual agreement to reflect current data. In the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of *U. S. v. Oregon,* Civil 68-513, (D.C. Or).

(8) The sharing formulas as set forth in this plan are based upon the premise that the marine area catches in U.S. controlled waters of fish originating above Bonneville Dam, other than fall chinook and coho runs, will be regulated by PFMC so as to be essentially de minimis portions of those runs. The parties acknowledge that if subsequent data should indicate that this premise is incorrect, these formulas may require revision.

(9) Regulations affecting treaty users which are enacted in conformity with this comprehensive plan shall be considered as complying with the court's decrees enunciated in *U. S. v. Oregon,* Civil No. 68-513, District of Oregon.

(10) Tribal members fishing pursuant to this agreement may employ only members of the Tribes, while exercising their treaty fishing rights.

(11) All fish numbers referred to in this agreement are *adult* fish.

(12) The sharing formulas contained herein for determining the treaty fishery share refer to those fish caught in the Columbia River below McNary Dam and any other inland off-reservation catch placed in commercial channels.

Except as provided in subparagraph 5 under Spring Chinook, neither treaty nor nontreaty non-commercial harvest in tributaries, or in the mainstem Columbia River

above McNary Dam, shall be considered in the sharing formulas contained herein.

(13) Upon thirty days written notice by any party, after five years from date, this comprehensive plan may be withdrawn or may be renegotiated to assure that the terms set forth represent current facts, court decisions, and laws.

Fish Management Plans.

A fish management plan has been adopted for those species of importance to assure future conservation of the resource and equitable sharing of the harvest between treaty Indians and nontreaty users. The formulas represent *Available Fish* for *Harvest* and may not reflect total catch if fishing effort is inadequate to harvest all available fish. All runs of fish described in this plan are those originating in the area of the Columbia River or its tributaries above Bonneville Dam.

Fall Chinook Salmon

The Columbia River fall chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish *entering* the Columbia River which are *destined* to pass Bonneville Dam.

(2) Escapement of 100,000 fish above Bonneville Dam shall be subtracted from total *in-river* run size.

(3) Additional fish above escapement are available for harvest and shall be shared 60% by treaty fishermen and 40% by nontreaty fishermen.

(4) The states' goal is to manage the fisheries to provide

and maintain a minimum average *harvestable* run size of 200,000 upriver fall chinook to the Columbia River.

(5) The 60% treaty share shall include mainstem ceremonial, subsistence, and commercial harvest as allocated by the Indian tribes. The 40% nontreaty share shall include *in-river* commercial and sport harvest as allocated by the appropriate agencies.

Spring Chinook

The Columbia River spring chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish *entering* the Columbia River *destined* to pass Bonneville Dam.

(2) Spawning escapement goals shall be a minimum of 120,000 and 30,000 fish above Bonneville and Lower Granite Dams respectively.

(3) The states' goal is to manage the fisheries to provide and maintain a minimum average run size of 250,000 upriver spring chinook to the Columbia River.

(4) Treaty ceremonial and subsistence catch shall have first priority. These fisheries shall not exceed a catch of 2,000 fish on a run size of less than 100,000 fish; 5,000 on a run size of between 100,000 and 120,000 fish; and 7,500 fish on a run size of between 120,000 and 150,000 fish. Treaty ceremonial and subsistence fishing for spring chinook with gillnets as well as other normal gear may occur, but such gillnet fishing shall be subject to a notification system similar to that presently used for ceremonial fishing. All catches shall be monitored cooperatively for the purpose of ascertaining the amount of the catch.

(5) On a run size of between 120,000 and 150,000 fish passing Bonneville Dam, the nontreaty fisheries are limited to the Snake River system and may harvest fish which are in excess of the 30,000 spawning escapement passing Lower Granite Dam. (Under average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam.)

(6) On a run size of more than 150,000 fish passing Bonneville Dam, all allocations as provided for in items 4 and 5 shall occur. All additional fish available for harvest below McNary Dam shall be shared 40 percent for treaty fishermen and 60 percent for nontreaty fishermen. If river passage conditions improve so as to provide more than 40,000 fish at Lower Granite Dam on run sizes of 150,000 fish or less, the 40 percent and 60 percent allocation may occur on a run size of less than 150,000 fish at Bonneville Dam.

Summer Chinook Salmon

Summer chinook salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish during the months of June and July

The parties agree that if the run size increases a formula for sharing of the available harvest above present escapement goals for this race shall be similar to spring chinook.

Summer Steelhead

(1) Run size shall be determined by the number of fish *entering* the Columbia River *destined* to pass Bonneville Dam.

(2) The escapement goal to spawning grounds above Lower

Granite Dam shll be a minimum of 30,000 fish. A run size of 150,000 fish at Bonneville Dam will provide for 30,000 fish at Lower Granite Dam.

(3) The treaty Indian mainstem fishery shall be limited to ceremonial, subsistence and incidental catch to other commercial fisheries. A minimum mesh restriction of 8 inches will be utilized to limit incidental catch.

(4) The Indian tribes recognize the importance of the steelhead stocks to recreational users and agree to forgo a target commercial fishery.

Sockeye Salmon

Sockeye salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish.

The parties agree that if the run size increases so as to provide harvestable quantities, such harvest shall be shared equally between treaty and nontreaty fishermen.

The parties recognize the importance of protecting summer chinook and summer steelhead stocks during the harvest of sockeye salmon. Incidental catch of summer chinook and steelhead shall be minimized by providing appropriate restrictions to the sockeye fishery.

Coho Salmon

Coho stock are in the treaty fishing area simultaneously with other species which currently need protection from fishing effort. Parties agree to use their best efforts to develop methods to maximize coho harvest while protecting those other species.

Shad

Shad runs have been sufficiently large to allow for unlimited harvest. However, because shad fisheries can take stocks of salmon and steelhead that are below harvestable levels, new catch methods shall be pursued particularly by the Indians above Bonneville Dam to assure a sufficient catch of shad while minimizing the catch of other species. If escapement goals and catch formula must be established in the future, the committee shall compile the required data and make recommendations to the managing fisheries agencies.

Sturgeon

The population of sturgeon in the Columbia River appears residual above Bonneville Dam. The parties agree that the Indian tribes shall have a commercial fishery regulated by sound principles of conservation and wise use. A sport harvest may occur simultaneously for sturgeon above Bonneville Dam.

Winter Season

The treaty fishermen shall be allowed a mainstem commercial fishery for any species of fish between *February 1*,and *April 1*.

This comprehensive plan for managing anadromous fisheries on stocks originating from the Columbia River and its tributaries above Bonneville Dam is adopted by the undersigned this 25th day of February, 1977.

/s/ _____
ROBERT W. STRAUB
GOVERNOR OF OREGON

/s/ _____
DIXY LEE RAY
GOVERNOR OF WASHINGTON

/s/ _____
HAROLD CULPUS
CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION
OF OREGON

/s/ _____
WATWIN POTMAN
CONFEDERATED TRIBES & BANDS
OF THE YAKIMA INDIAN NATION

/s/ _____
LESLIE MINTHROW
CONFEDERATED TRIBES OF THE
UMATILLA INDIAN RESERVATION

/s/ _____
RICHARD A. HALFMOON, CHAIRMAN
NEZ PERCE TRIBE OF IDAHO

/s/ _____
ALTA A. GUZMAN, SECRETARY
NEZ PERCE TRIBE OF IDAHO

UNITED STATES
OF
AMERICA

/s/ _____
JOHN HOUGH
SPECIAL ASSISTANT TO THE
SECRETARY OF THE INTERIOR

APPENDIX B
UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
U. S. Department of Justice
Washington, D.C. 20530

Re: *Idaho v. Washington and Oregon*

Dear Mr. Moorman:

The purpose of this letter is to forward the position of the Department of the Interior on United States intervention in the above referenced case. This will supplement our view of March 6 and 21, 1978.

Based upon review of the equitable and legal considerations involved, we recommend that the United States intervene in that case as a party. Any other position would deny Idaho its day in court and work a substantial injustice to that State's rights. Moreover, this Department, and the United States generally, has a trust obligation to eschew any derrogation of the treaty secured fishing rights of the Shoshone-Baunock Indians of the Fort Hall Indian Reservation.

This position is not inconsistent with our obligations to those tribes with adjudicated rights on the lower Columbia River. The rights secured to those must be fully protected in any litigation to which the United States is a party.

Sincerely,
Leo M. Krulitz
Solicitor

APPENDIX C
UNITED STATES GOVERNMENT
MEMORANDUM

Date: January 30, 1979

Reply to Attn. of: Louis F. Claiborne

Subject: *Idaho v. Oregon and Washington, No. 67, Original*

To: The Solicitor General

The question is whether the United States, an indispensable party enjoying sovereign immunity, ought to intervene so as to allow the action to proceed. I recommend *NO INTERVENTION*.

1. In March 1975, the State of Idaho (on the relation of the then Governor, now Secretary, Andrus) filed an original complaint against the States of Oregon and Washington asking the Court (1) to require the two defendant States to admit it to the Columbia River Fish Compact and (2) to order an equitable apportionment of the anadromous fishery of the Columbia River basin (which includes the Snake River and its Idaho tributaries, the Clearwater and the Salmon, important breeding grounds for salmon and steelhead). Oregon and Washington opposed leave to file the complaint alleging, *inter alia*, that the United States was an indispensable party which had not consented to suit.

In October of the same year, the Court asked our views. We consulted the Department of the Interior, which then opposed intervention. Our response to the Court was somewhat equivocal. Without clearly saying so, we suggested the United States was an indispensable party because of the treaty-protected fishing rights of four Indian Tribes, whose interests would be effected by any apportionment between

the States. We adverted to possible intervention as a way of overcoming this obstacle, but left that decision open. We urged denial of the motion for leave to file "at this time," pointing out that the two defendant States were (as we wrongly believed) about to admit Idaho to the Compact.

The Court heard oral argument on the motion in November 1976 and rendered a *per curiam* opinion in December. 429 U.S. 163. Leave to file was granted, limited to the prayer for apportionment and expressly leaving open whether the complaint stated a justiciable claim and whether the United States was an indispensable party.

In due course, the matter was referred to Judge Breitenstein as Special Master. 431 U.S. 952. We had an observer at the hearings and ultimately (in April 1978) filed a brief with the Master expressly asserting the indispensability of the United States, indicating that we would not intervene, and urging dismissal of the action. This was then the position urged upon us by the Department of the Interior.

At the end of July 1978, the Special Master submitted to the parties his draft Report. It concluded that the United States was an indispensable party and accordingly recommended dismissal. Judge Breitenstein scheduled a hearing on the draft report, ultimately fixed for November 8. A month earlier, he wrote us asking if we adhered to our decision not to intervene.

Just before the scheduled hearing, we were approached by the Shoshone-Bannock Tribe of the Fort Hall Reservation in Idaho, who claim a treaty right to take fish from a southern fork of the Salmon River, an Idaho tributary of the Snake River, which, in turn, flows into the Columbia. The Tribe, supported by Idaho, asked us to intervene to protect those

rights. We asked the Special Master for time to consider that request and he agreed to delay filing his report until February 1. He made it clear that no further postponement would be granted.

2. At this point, I initiated discussions with the Tribe's attorneys and other interested parties. After consulting with the Associate Solicitor for Indian Affairs at Interior, Myles Flint (Chief of the Indian Resources Section of the Lands Division) and I went to Portland and conferred, separately, with attorneys for the Shoshone-Bannock Tribe, attorneys for the four Tribes with recognized treaty fishing rights on the Columbia River, and the Attorney General of Oregon and the Assistant Attorney General of Washington.

We explored the possibility of persuading the two States and the four Tribes, parties to a consent judgment in *United States v. Oregon* in the Oregon district court, to amend the existing apportionment plan to allow more fish into Idaho, some of which would reach the traditional fishing grounds of the Shoshone-Bannock. There was some indication that this might be agreed with respect to runs larger than those recently available.

The State of Idaho now renewed its efforts to change the government's position. Myles Flint and I attended a meeting of the Idaho emissaries with Secretary Andrus and Mr. Flint attended another at the Department of Agriculture. I have since heard repeatedly from the Shoshone-Bannock attorneys and have had a long conversation with the Attorney General of Idaho. After those meetings, and with the concurrence of the Solicitor of Interior and the Lands Division, I circulated a concrete proposal to secure a greater escapement of fish into Idaho when the runs improved. The sugges-

tion was that acceptance of this compromise, or something like it, would probably allow us to continue blocking the original action. That was on December 18.

In due course, replies were received. Three of the Tribes party to the *Oregon* settlement indicated their refusal of the proposal. The attorney for the Nez Perce Tribe has not replied. The State of Oregon accepted my proposal. The State of Washington, however, has rejected it. Both Mr. Flint and I have held long telephone conversations with Washington Deputy Attorney General Mackie, to no avail. We must accept the fact that, in that quarter, our bluff has been called.

Yesterday, we received a new recommendation from the Department of the Interior, urging intervention. It was personally determined by Secretary Andrus, contrary to the view voiced only days before by his lawyers. No recommendation has been received from the Department of Agriculture. As you know, the Senators from Idaho and Oregon have written in support of the stance of their States.

3. There are three arguments in favor of intervention: (1) Our duty as trustee to the Shoshone-Bannock Tribe — which is no less than our conflicting duty to defend the status quo insofar as it favors the four Tribes party to the *Oregon* settlement; (2) the apparent justice of Idaho's claim that it produces many (if not most) of the fish and yet enjoys only a minimal share of the harvestable resource, which is "fished out" before the fish return to Idaho waters; and (3) the principle that, wherever the merits lie, we ought not invoke our indispensability and sovereign immunity to block *bona fide* litigation between States when no other forum is available for resolution of the dispute.

The claim of the Shoshone-Bannock Tribe, so far as we can determine, is not urgent. It appears that the Tribe presently satisfies most of its subsistence and ceremonial needs — which is all that is sought. The Tribe's concern, at least primarily, is for the future, in the event the escapement diminishes or Idaho ceases to recognize the Indian priority. It is, moreover, an unfortunate reality that assuring one harvestable fish for the tribe probably requires some eight or ten to go by the fisheries on the mainstem of the Columbia. This means very substantially penalizing both Indian and non-Indian fishermen on that river, and also involves sacrificing three or four fish to death in the effort to surmount all the intervening dams. In all the circumstances, the claim of the Shoshone-Bannock is not strong enough, in my view, to justify intervention.

Idaho's claim is somewhat stronger. The present plan, adopted by the district court in the *Oregon* case, provides that Idaho's sports fishermen shall never see more than 7,500 harvestable salmon, no matter how large the run. This seems inequitable. Nor does Idaho have any obvious alternative forum to test its claim. If it sought to intervene in the *Oregon* district court case, it would probably be compelled, at this late date, to accept the existing plan, until it expires some two years hence. Besides, any posture adversary to Oregon and Washington would presumably defeat the jurisdiction of the district court.

On the other hand, there are powerful arguments against this original suit. There *is* an existing settlement which ought not lightly be disturbed. We *do* have an obligation to the four Tribes on whose behalf we sought and obtained a judgment in the *Oregon* case. Also, if we were to intervene in

the original action, it seems doubtful if we could prevent opening up to controversy the federal government's management of the off-shore fishery and our operation of the Columbia River dams — very complex and delicate issues. And, finally, we may question whether the Supreme Court is equipped to exercise the continuing jurisdiction necessary to enforce any judgment it may render. In sum, the case is to be avoided if, in conscience, that can be done.

On balance, I believe the objections to the action counsel us to continue to block it. Even the State of Washington has indicated its willingness to concede something to Idaho if fish passage conditions are improved. We can continue to press the States of Oregon and Washington to modify the *Oregon* plan — to which we are a party — when it comes up for renewal in two years' time. For the moment, I would urge the Court to dismiss Idaho's suit, without prejudice to refiling if no other remedy is forthcoming.

APPENDIX D

MAJOR FEDERAL STATUTES COMMITTING THE UNITED STATES TO A POLICY OF CONSERVING, PROTECTING AND ENHANCING FISH AND WILDLIFE AND THEIR HABITAT

1. National Agricultural Research, Extension and Teaching Policy Act of 1977, 7 U.S.C.A. § 3101(8) (H) (1977)

2. 16 U.S.C. § 460 (d) (1976)

3. 16 U.S.C. § 460 (k-l) (1976)

4. 16 U.S.C. § 460 (aa) (1976)

5. 16 U.S.C. § 460 (gg) (1976)

6. Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (1976)

7. 16 U.S.C. §§ 582(a), 582(a-6) (1976)

8. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, 663 (1976)

9. National Wildlife Refuge System Administration Act Amendments of 1974, 16 U.S.C. § 668dd(a) (1976)

10. 16 U.S.C. §§ 670(g), 670(h) (1976)

11. 16 U.S.C. § 683 (1976)

12. Fish and Game Sanctuary Act, 16 U.S.C. § 694 (1976)

13. Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(a), 742(f) (1976)

14. 16 U.S.C. §§ 755, 756 (1976)

15. Anadromous Fish Conservation Act, 16 U.S.C. §§ 757(a), 757(b) (1976)

16. Federal Aid in Fish Restoration Act, 16 U.S.C. § 777 (1976)

17. Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. § 779(a) (1976)

18. Black Bass Act, 16 U.S.C. § 852 (1976)

19. Wilderness Act, 16 U.S.C. §§ 1131 et seq. (1976)

20. Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (1976)

21. Endangered Species Act of 1973, 16 U.S.C. § 1531 (1976)

22. National Forest Management Act of 1976, 16 U.S.C. § 1604(g) (1976)

23. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801, 1851 (1976)

24. Rivers and Harbors Appropriation Act of 1888, 33 U.S.C. § 608 (1976)

25. Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251(a) (2), 1252, 1312 (1977)

26. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq.

27. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a) (8) (1976)

Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 67, Original

STATE OF IDAHO, ex rel JOHN V. EVANS, Governor, DAVID H. LEROY, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATES OF OREGON and WASHINGTON,

Defendants.

STATE OF OREGON'S RESPONSES TO PLAINTIFF'S EXCEPTIONS TO MASTER'S REPORT

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Supreme Court Rule 9(2) 2, 3

In the Supreme Court of the United States

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vs.

STATES OF OREGON and WASHINGTON,

Defendants.

STATE OF OREGON'S RESPONSES TO PLAINTIFF'S EXCEPTIONS TO MASTER'S REPORT

STATEMENT

On May 1, 1979, the State of Idaho filed Plaintiff's Exceptions to Report and Supplemental Report of the Special Master on the Affirmative Defenses of Oregon and Washington to the Complaint of Idaho (hereinafter "Plaintiff's Exceptions"). The State of Oregon respectfully submits the following response to those exceptions.

RESPONSES

I. THE SPECIAL MASTER WAS CORRECT IN HIS FINDING AND CONCLUSION THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO THIS SUIT.

In his report and supplemental report to this Court, the Special Master found the United States an indispensable party to this litigation and recommended that Idaho's complaint be dismissed because the United States could not be joined and refused to intervene. The Master's finding of indispensability was based on three factors. First, the United States, through the Corps of Engineers, controls the operation of eight dams over which anadromous fish produced in Idaho must pass on both their outward and return migrations. Second, the federal government exercises jurisdictional control over ocean fishing in the 200-mile zone, except for the three-mile territorial area of the coastal states. Third, the United States is trustee for the Indian tribes with treaty fishing rights in the Columbia River System. Master's Report, 17, 24.

A. The criteria of indispensability found in F.R.Civ.P. 19 were properly applied.

The State of Idaho contends in its exceptions that the United States is a dispensable party to this suit. Plaintiff's Exceptions, 19-28. Plaintiff argues that flexible application of F.R.Civ.P. 19 is required by Supreme Court Rule 9(2) and only the Master's unnecessarily rigid application of F.R.Civ.P. 19 led to the conclusion that the United States is an indispensable party.

It is the position of the State of Oregon that the

Special Master correctly applied the criteria listed in Rule 19(b), F.R.Civ.P. This Court very recently reaffirmed the principle that a suit in equity cannot be maintained without the joinder of indispensable parties. *California v. Arizona,* 59 LEd2d 144, 148 (1979). *California v. Arizona* was also a suit between states in the original jurisdiction of this Court. In footnote 3 the Court set out the F.R.Civ.P. 19 guidelines, as well as Supreme Court Rule 9(2), and concluded with the observation: "This Court has dismissed cases in its original jurisdiction for want of an indispensable party." *California v. Arizona,* 59 LEd 2d 144, 148-49, n. 3 (1979) (citations omitted).

The State of Idaho suggests that it has a constitutional right to an adjudication of its claim on the merits in this Court under "flexible procedural requirements" that ignore common concepts of indispensability. Plaintiff's Exceptions, 12, 16. F.R.Civ.P. 19 is not a technical rule, nor was it applied technically by the Special Master. The rule lists four factors for consideration in determining whether in equity and good conscience a case should proceed or be dismissed for nonjoinder of an interested party. Although application of the factors may yield different results in suits between quasi-sovereigns than in other types of litigation, basic principles of equity do not change. The Special Master concluded that Idaho's suit should not,

in equity and good conscience, proceed so long as the United States could not be made a party. This was the determination the Master was required to make; it was not a mechanical or technical application of the F.R.Civ.P. 19 factors.

B. This suit should not proceed in the absence of the United States as a party.

1. The United States is indispensable because of its status as a trustee for the Indians.

The United States is an indispensable party to this litigation, as found by the Special Master, in part because of its status as trustee for the Indians who have treaty-protected fishing rights in the Columbia River Basin. Plaintiff asserts that this finding rests on the erroneous assumption that if defendants are required to allow more fish to pass Bonneville Dam the Indians will "over-harvest" the increased runs "in violation of the settlement agreement reached in *Sohappy v. Smith,* and neither Oregon, Washington nor Idaho would or could enforce the agreement". Plaintiff's Exceptions, 25-26.

Plaintiff misapprehends the Master's findings regarding the relationship of treaty fishing rights and the *Sohappy* agreement to an equitable apportionment of the non-treaty fishery. The *Sohappy* agreement, attached to Plaintiff's Exceptions as Appendix A, shows that for all species except Spring Chinook the

sharing formulas do not take into account any non-commercial fishery in tributaries or in the mainstem Columbia River above McNary Dam. The settlement agreement in *Sohappy* attempts to allot between treaty and non-treaty fishermen the opportunity to harvest those anadromous fish destined to pass Bonneville Dam. The non-treaty commercial fishery has been restricted to the area below Bonneville Dam since 1957. Master's Report, 10. As a practical matter, then, non-treaty commercial fishing is restricted below Bonneville Dam in order to allow the tribes the opportunity to take their share of the harvestable fish destined for usual and accustomed tribal fishing stations. Treaty and non-treaty commercial fishermen are not competing for their respective shares in the same area of the Columbia River. Once the harvest is reduced below Bonneville Dam, there is simply a larger amount of fish available for the treaty fisheries, beyond the level of escapement all parties are required to allow. Oregon and Washington have no interest in restricting the treaty Indian harvest above Bonneville Dam except to protect spawning escapement. This is the only "over-harvest" in violation of the *Sohappy* agreement that is practically possible.

The Special Master concluded, correctly, that nothing in *Sohappy* would prevent treaty fishermen from harvesting any increased number of fish allowed by

defendants to pass Bonneville Dam, so long as the minimum spawning escapement is preserved. Recent history has shown this is precisely what has happened as non-Indian commercial fishing has declined. Master's Report, 20. Idaho cannot, therefore, be assured of receiving any adjudicated share of the anadromous fishery unless the Indian commercial catch is restricted. Such a restriction is impossible unless the United States, in its capacity as trustee for the Indians, is a party to this suit. Unless the United States is party, to be bound by any decree entered by this Court, adequate relief cannot be given to the plaintiff. It would be inequitable to require defendants to forego a valuable economic opportunity without any assurance that the sacrifice would produce an enhanced fishery for Idaho.

The United States in its capacity as trustee for the Indians is an indispensable party to this litigation for yet another reason. Plaintiff claims it seeks an apportionment only of the non-treaty fishery. Nevertheless, because of the geographic distribution of the fisheries and the locations of the principal treaty and non-treaty commercial harvesting areas, plaintiff is, in effect, asking for an allocation of the anadromous fish that are not only destined to, but *do* pass Bonneville Dam. Such an allocation necessarily involves the interest of those Indian tribes with adjudicated treaty

fishing rights. This is analogous to the situation in *Texas v. New Mexico,* 352 U. S. 991 (1957) cited by the Special Master.

Indian treaty fishing rights present further obstacles to the relief sought by plaintiff. The Shoshone-Bannock Tribes have asserted treaty rights in the additional fishery sought by Idaho. The United States stands as trustee for these tribes. Master's Report, 27. The apportionment Idaho demands thus directly involves the rights of those Indians and the United States must be present as a party to protect their interest. Furthermore, a conflict exists between the four lower tribes who are parties to *Sohappy* and the Shoshone-Bannocks. Any attempt to redistribute the opportunities to harvest anadromous fish in the Columbia River System will implicate the concurrent and conflicting rights of these Indian tribes to such an extent that the United States must be present as a party.

The United States, in its capacity as trustee for the Indians, is therefore an indispensable party to this litigation for two reasons. If the tribes cannot be bound by a decree of this Court requiring them to allow a certain number of fish to pass on to Idaho, adequate relief cannot be given in this case. The tribes also have treaty rights in the subject matter of which Idaho seeks an apportionment.

2. The United States is indispensable because of its control over eight dams on the Columbia River System, and the ocean fishery.

Plaintiff asserts that the United States is not an indispensable party to this litigation because of the activities of its agencies in controlling the regimen of the Columbia River System. Plaintiff's Exceptions, 22-25. Defendant State of Oregon responds that the Special Master was correct in his finding. The United States is an indispensable party because of the control it exercises in determining passage conditions for the fish Idaho seeks to have apportioned, and because of its role in establishing the equities of production on which Idaho bases its claim.

Just as it would be unjust and inequitable to enter a decree requiring defendants to forego a valuable opportunity to harvest anadromous fish on their return migration without assurance that those fish would not be caught by treaty fishermen instead of reaching Idaho, so it would be unjust and inequitable to enter such a decree without any assurance that the uncaught fish would not be lost because of inadequate passage conditions and facilities at the eight dams to be passed between the Pacific Ocean and fishing grounds in Idaho. Any apportionment would depend on the will of a non-party for its effectiveness. Such relief is not adequate within the meaning of the

F.R.Civ.P. 19(b) equity and good conscience guidelines.

The Special Master correctly found "any apportionment to Idaho requires some arrangement so that a sufficient number of upstream migrants get over Bonneville and the seven other dams, and through the Indian reservations, to Idaho in the required numbers." Master's Report, 28. Such an arranagement cannot be made unless the United States is a party to this suit, bound by any decree entered by this Court.

Plaintiff argues that federal control over the rate of mortality to anadromous fish on their downstream or outward migration is immaterial in this litigation. This argument is based on the premise that Idaho is claiming only an equitable portion of adult fish on their return migration. Plaintiff's Exceptions, 22-23. Such a contention is inconsistent with the theory upon which Idaho founded this litigation: it is entitled to a share of the anadromous fish in the Columbia River Basin based on the equities of *production.* Complaint, Paragraph X.

The equities of adult anadromous fish production, upon which an apportionment would be based, cannot be determined in the absence of the United States as a party. The number of anadromous fish that *will* return to any given area is dictated by many factors. These include: ocean harvests; the level of federally funded

or controlled hatchery production; water level, quality and temperature—determined in part by diversion of water for irrigation or other purposes and the management of timber and range land in spawning areas; construction design or modification of spillways and ladders in the dams over which fish must pass; and the amount of water allowed to flow over dam spillways instead of through turbines—determined in large measure by demand for and commitment to supply electric power. All of these factors are controlled predominantly by agencies of the United States.

Plaintiff's reliance on the case of *Florida v. Georgia,* 17 How. 478 (1855) is misplaced. In *Florida* the United States Attorney General was *seeking* to be heard, without becoming a party, in a suit between states in which there was no need for the United States to be bound by a judgment. In the case presently before this Court the United States is indispensable because it must be bound by any judgment for that judgment to be adequate. Furthermore, here the United States is not seeking to be heard without becoming a party, but has urged that this suit be dismissed because of its indispensability. Memorandum for the United States as Amicus Curiae (April, 1979).

There is no procedural substitute for the joinder of the United States as a party that will satisfy those

concerns that make the United States indispensable to this litigation. Since the United States cannot be joined without its consent and has refused to intervene, the Master was correct in his conclusion that the complaint should be dismissed.

II. THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FROM SUIT IN THIS LITIGATION.

A. The Doctrine of Sovereign Immunity Applies.

Plaintiff argues that even if the United States is a necessary party to this litigation, it can be made a party because it has waived its sovereign immunity. Plaintiff's Exceptions, 28-38. This contention is new in this suit and unsupported by the law.

Idaho urges this Court to "retreat from the last bastion of sovereign immunity" and not permit the United States to "thwart meritorious litigation". Plaintiff's Exceptions, 29-30. The doctrine of sovereign immunity cannot so easily be abolished. As this Court stated very recently, in a case between states in its original and exclusive jurisdiction: "It is settled that the United States must give its consent to be sued even when one of the States invokes this Court's original jurisdiction." *California v. Arizona,* 59 LEd2d 144, 148 (1979). It is immaterial that the United States has chosen a course not supported by all of the officials or agencies involved. Neither is it

material that Idaho may be forced to a political settlement instead of judicial resolution if this Court dismisses its complaint.

> "It is clear, of course, that Congress could refuse to waive the Nation's sovereign immunity in all cases or only in some cases but in all courts. Either action would bind this Court even in the exercise of its original jurisdiction." *California v. Arizona,* 59 LEd2d 144, 150 (1979).

B. The United States has not waived its Sovereign Immunity.

Plaintiff contends Congress has waived the sovereign immunity of the United States by amendments to the Administrative Procedures Act, 5 U.S.C. §§ 551, et seq., specifically § 702. Plaintiff omitted in its brief the first sentence of § 702, which immediately precedes the portion quoted.

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

This statute is not a general waiver of sovereign immunity. If it were, the problem faced by this Court in *California v. Arizona,* 59 LEd2d 144 (1979) would never have arisen. The amendment eliminated sovereign immunity as a bar to actions brought by an *aggrieved* person for judicial *review* of agency action or inaction. This suit is not an action for review of federal agency action or inaction. Furthermore, plaintiff has

maintained throughout this litigation that it is not aggrieved by any action or inaction of the United States except its refusal to intervene in this suit. "[T]he United States has taken no harmful action and Idaho has no cause of action against the United States or its trustees at this time . . . ." Plaintiff's Exceptions, 17. The sovereign immunity of the United States from joinder in this case in not waived by 5 U.S.C. § 702.

Federal statutes committing the United States to the protection and maintenance of wildlife resources do not waive sovereign immunity in this suit. While *violation* of those statutes *might* create a cause of action, an adequate judicial remedy in this litigation requires more than that the United States follow a statutory policy of protecting anadromous fish. In order for an allocation of a portion of the fishery to Idaho to be effective, and therefore adequate, the United States must be bound to a decree enjoining specific acts and practices not prescribed by any statute. Preservation and enhancement of anadromous fish runs does not necessarily require maintenance of a sport or commercial fishery for the State of Idaho; nor do any of the statutes cited by plaintiff require the United States to administer its programs to ensure an equitable distribution of fish between the states. There is no statute by which Congress has

waived the sovereign immunity of the United States from joinder in this suit. The statute recently construed by this Court in *California v. Arizona,* 59 LEd2d 144 (1979) was a specific waiver of sovereign immunity. This is, perhaps, the type of legislation Idaho should seek to allow judicial resolution of alleged inadequacies in fishery allocation, but no such statute exists at this time.

Plaintiff contends that the United States in its role as trustee for the Indian tribes waived its sovereign immunity by its participation as a party in *Sohappy v. Smith,* 302 F Supp 899 (D.Or. 1969). This contention must fall for the same reasons the Special Master found the United States an indispensable party because of its trustee status. The litigation in *Sohappy* was based on treaty rights, not equities of production. Furthermore, there was no adjudication of any rights of Idaho to any portion of the anadromous fishery and no party assumed any of the duties that an adequate decree of allocation in this suit would impose. As noted above, the sharing formulas set out in the management plan reached in settlement of *Sohappy* specifically refer only to fish caught below McNary Dam, except for spring Chinook. The litigation of Indian fishing rights in *Sohappy v. Smith* did not and does not waive the sovereign immunity of the United States in this suit.

III. EQUITABLE APPORTIONMENT OF THE FISHERY IS NOT SUSCEPTIBLE OF JUDICIAL DETERMINATION, AND ENFORCEMENT AND WOULD BE UNDULY BURDENSOME TO THIS COURT.

The Special Master found that "[t]he preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and philosophical conflicts not solvable by judicial action." Master's Report, 24. Idaho excepts to that finding and asks for an opportunity to present its evidence on the merits. Plaintiff's Exceptions, 39, 41. The Master took evidence on the complexity of fishery management and allocation and made detailed factual findings. Master's Report, 6-11. These problems cannot be simplified by the presentation of additional facts.

The anadromous fish that Idaho seeks to have apportioned are dependent on good water quality, sufficient water levels and flows, adequate passage conditions and restrictions on harvesting for their survival. Water quality, levels and flows are subject to many variables, some natural and some man-made. Timber and range land management, demand for irrigation water, energy requirements and the weather all play a role in determining the conditions in the Columbia River System. All except the weather are

affected by several environmental, social, legal, political and philosophical factors. The fishery itself, both in the ocean and in the river, is subject to a variety of influences, including considerations of international relations. The problem is not that such complexity would make judicial determination and enforcement somewhat difficult, rather, it makes such judicial resolution impossible.

If the innumerable conflicts presented by plaintiff's complaint could somehow be judicially resolved to reach an approtionment decree, such a decree would require for its enforcement a form of constant and close supervision inappropriate for this Court. Master's Report, 22. Contrary to plaintiff's contention, this finding does not presuppose bad faith on anyone's part. The equities upon which any allocation would be based are subject to change from day to day. The same is true of the specific acts that would be required of each party to ensure that allocated percentages are realized. The execution of a decree in this case would require day-to-day decision-making according to ever-changing facts, not principles of law. A decree requiring this type of execution was found inappropriate in *Vermont v. New York*, 417 U.S. 270 (1970). It would be equally inappropriate in this suit, and would require supervision not within the Article III powers of this Court.

IV. CONCLUSION

The State of Oregon urges this Court to adopt the recommendations of the Special Master. The United States is an indispensable party that cannot be joined without its consent. The sovereign immunity of the United States has not been waived.

The relief sought by the State of Idaho in this case involves numerous conflicts not susceptible of judicial resolution. Any attempted apportionment would require for its enforcement a type of continual supervision inappropriate for this Court.

Plaintiff should return to the conference table where a reasonable solution to the problems it has posed may be found. This action should be dismissed.

Respectfully submitted,
JAMES A. REDDEN
Attorney General of Oregon

Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 67, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game, — *Plaintiffs,*

v.

STATE OF OREGON, STATE OF WASHINGTON, *Defendants.*

DEFENDANT STATE OF WASHINGTON'S RESPONSE TO PLAINTIFF'S EXCEPTIONS

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v.

STATE OF OREGON, STATE OF WASHINGTON, *Defendants.*

DEFENDANT STATE OF WASHINGTON'S RESPONSE TO PLAINTIFF'S EXCEPTIONS

I.

INTRODUCTION

The plaintiff State of Idaho asserts that it is seeking by this action to protect the "diminishing runs of spring Chinook salmon, summer Chinook salmon, and summer steelhead"

(Idaho Br. 5/1/79, p. 2) and to secure from this Court an "equitable" apportionment of the upriver anadromous fish runs in the Columbia River Basin. This Court has denied other relief sought by Idaho (429 U.S. 163) and appointed a Special Master for further proceedings (431 U.S. 952).

The Special Master's report and supplemental report of February 2, 1979, has concluded:

(1) "The question of whether a state may maintain an original action for the apportionment of a migratory fish run is one of first impression and should be decided after trial on the merits, not on the pleadings." (Rpt. 17)

(2) The United States is an indispensable party to these proceedings, and the case cannot proceed without joinder of the United States. (Rpt. 4)

II.

SUMMARY OF ARGUMENT

No party at any time prior to the plaintiff's brief of May 1, 1979,

disputed the assumption that the United States, by virtue of its sovereign immunity, cannot be joined in this action without its consent. Further, prior to that brief, Idaho did not contend that the United States either consented or waived its immunity for this proceeding.

This Court as recently as February 22, 1979, observed in California v. Arizona, 59 L. ed 2d. 144:

> "'It does not follow that because the state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion.' Kansas v. United States, 204 U.S. 331, 342. (Supra at 148)
>
> "Thus, if the United States has not consented to be sued in an action such as this [original action between states] California's motion for leave to file a complaint must be denied." (Supra at 149)

Those statements by this Court were made with the express recognition that if this court did not hear

the dispute between California and Arizona, then the suit could not be maintained in any court.

The plaintiff vigorously disputes the decision consciously made by the United States not to waive its immunity and join this litigation. But the plaintiff avoids what should have been a major consideration by the United States not to encourage the continuation of this litigation. That is the impact of the United States Corps of Engineers' dams on the Columbia and Snake Rivers upon the fishery resource:

> "Well-intentioned, legitimately concerned, but poorly informed Idaho sports fishermen, for example, today commonly blame non-Indian and Indian gillnetters for the endangered condition of Snake River Summer Chinook. Yet these fish have had almost total protection from the gillnet fishery since 1965.
>
> "Many, perhaps most Idaho salmon and steelhead sports fishermen are not aware or do not believe main

> stem Columbia and Snake River dams are predominantly responsible for virtually eliminating salmon and steelhead fishing in Idaho." (Exhibit W-3, p. 26)

Yet this suit is directed against the States of Washington and Oregon which did not authorize, construct or operate those eight United States Corps of Engineers' dams which have and continue to have a severe impact upon the fish resource.

Idaho has expressed concern with reference to three species of fish: Upriver spring Chinook, summer Chinook, and summer steelhead. With reference to those species the Special Master found:

(1) That since 1964 there has not been a commercial harvest of upriver summer Chinook in the Columbia River and from 1964-76 not even a sports fishery. (Rpt. 10) Although not part of the record, no commerical season for summer Chinook was permitted in 1977 or 1978, and none is planned for 1979. The only sports

harvest of summer Chinook since 1977 has been of immature "jacks" not mature fish.

(2) From 1967-1973 the commercial harvest for upriver spring Chinook was limited to eleven days, with a one-day season in 1974, none in 1975 or 1976, (Rpt. 10) and during the period 1977 to 1979 there has been a total of seven days for such harvests.

(3) The commerical harvest of steelhead has been limited for some time, with the exception of Indian harvests, and in 1975-76 even the recreational harvest was closed. (Rpt. 10) The recreational or sports harvest in the lower portion of the Columbia River normally reflects the harvest of only 7,000 summer steelhead on a run size of approximately 150,000. (Tr. 133)

What further restrictions can Idaho desire?

While the non-Indian fishery which is subject to regulation by Oregon and Washington in the Columbia River has been prohibited or sub-

stantially restricted, the Master noted and recognized:

> "The Indian catch of salmon and steelhead increased from a low of 39,700 pounds in 1959 to a high of nearly 3,000,000 pounds in 1975 and 1976." (Rpt. 10)

It is in that context that the Special Master has found that the United States is an indispensable party not only as trustee for four Indian tribes which have treaty protected fishing rights in the Columbia River, but also by virtue of its construction and operation of facilities which affect both the upstream and downstream passage of fish. (Rpt. 4)

III.

ARGUMENT

I. INTRODUCTION

Briefs previously filed with the Special Master and this Court have extensively discussed both the factual and legal basis for concluding that the United States is an indispensable party in the present proceedings. We

are referring to the Brief of the defendant State of Washington on the Indispensability of the United States (February 24, 1978); the Brief of the State of Oregon on Affirmative Defenses, and the Memorandum by the United States as Amicus Curiae, April 6, 1978, and April, 1979. Also, the Report and Supplemental Report of the Special Master, February 2, 1979, clearly and succinctly indicates the factual and legal basis for concluding that the United States is an indispensable party. In light of those briefs and the Master's Report, we will here limit our comments.

Before proceeding, we should note that the State of Washington has presented arguments both to this Court and to the Special Master that Idaho's complaint fails to state a claim upon which relief can be granted. While we believe that our contention is correct, we have difficulty faulting the Special Master's conclusion that since the question presented is one of first impression, it is appropriate not to decide the matter on the basis of the

pleadings.

If this litigation continues, the nature and extent, if any, of the right asserted by Idaho will have to be determined on the basis of an appropriate record. We must emphasize that there is a fundamental difference between water right adjudications between states and the requested relief here relating to migratory fish. In water law, within each state water rights are in the nature of a property interest, whether based on a riparian or an appropriation theory. The holder of water rights has the right to use the quantity of water reflected by the right in accordance with his priority in reference to other holders of water rights. Thus, water right adjudications between states are the means by which property interests within states are harmonized and coordinated with water rights in an adjoining state. In contrast, with reference to wild animals and fish there are no holders of property rights in the wildlife. As this Court recently observed in Hughes v.

Oklahoma, 47 LW 4447, 4451 (April 24, 1979) quoting from Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1965):

> "A state does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals."

In the absence of individually held rights, as exist in water law, it is neither necessary or appropriate to create a federal common law of wildlife comprable to water law since there are no property rights which require harmonization and coordination between adjoining states.

2. INDISPENSABILITY OF THE UNITED STATES

Snake River rises in Wyoming, flows across Idaho, and forms the boundary between Idaho and Oregon for approximately one hundred and sixty-five miles. The Snake River then forms the boundary between Idaho and Washington for approximately thirty miles, enters Washington and flows nearly one hundred miles to its confluence with the Columbia River. Approximately twenty miles below the conflux of the Snake

and the Columbia, the Columbia River forms the boundary between Oregon and Washington for two hundred and seventy miles ending where the Columbia River flows into the Pacific Ocean.

The major attention in this proceeding has been directed to the Snake and Columbia Rivers from the Idaho-Washington border to the Pacific Ocean, but it must be emphasized that the spawning and rearing of anadromous fish occur in other portions of the Columbia River Basin. (See Exhibit W-1, Map, p. 3) Those fish are at times in the Lower Columbia River mixed with Snake River fish and thus there may not be "a definite point that you can establish effective harvest splits on separating the two groups of fish." (Tr. 180)

Fish attempting to migrate from Idaho to the Pacific Ocean must successfully pass eight dams constructed and operated by the United States Corps of Engineers. These dams are listed in the sequence that the fish encounter them in their downstream migration.

(The date in parenthesis reflects the date of construction.)

Lower Granite (1975)
Little Goose (1970)
Lower Monumental (1969)
Ice Harbor (1961)
McNary (1953)
John Day (1968)
The Dalles (1957)
Bonneville (1938)

The United States Corps of Engineers, United States Bureau of Reclamation and the Federal Energy Regulatory Commission exercise control over the release of water from dams in the Columbia Basin. "Without provision for spill water, the migrating smolts must pass through the turbines with resulting high mortalities." (Rpt. 8) In 1973, a low water flow year in the Columbia River, more than 95 percent of Snake River juvenile salmon and steelhead migrating during low flow were killed before reaching the Columbia River below Bonneville Dam. (Exhibit W-3, p. 6 and Tr. 116) The survival of downstream Chinook juveniles to The Dalles Dam, which is the next to last dam encountered by downstream

migrants, varied from 55 to 65 percent during 1965-69, but dropped to 24 percent in 1970; 15 percent in 1972; and 5 percent in 1973. (Exhibit W-4, p. 5) A similar pattern of mortalities existed for steelhead juveniles. In addition to the fish mortality presented by each dam, a reduction in stream flow by the dams impounding water causes some fish to become disoriented in slack water and lose the urge to migrate to the ocean. (Tr. 243 and Exhibit W-4, p. A-15)

Those anadromous fish which successfully migrate to the Pacific Ocean reside there until they die, are caught, or achieve maturity and commence their return migration to their place of origin. While the anadromous fish are highly mobile in the ocean, a substantial portion of the fishery harvest is subject to the jurisdiction of the United States government under the Fishery and Conservation and Management Act of 1976. (16 U.S.C. 1801)

Adult fish seeking to return to Idaho encounter the eight United States dams. While each dam has fish ladders,

those ladders require monitoring and modification to be effective. Further, some fish ascending the ladders are lost by "fallback" resulting from disorientation after a downstream return over spillways. (Tr. 123) The loss of upstream migrants at each mainstem dam has been estimated at 15 percent. (Exhibit W-3, p. 6) (Rpt. 9)

The problem presented for fish passage by the construction and operation of these dams by the federal government is dramatically illustrated by comparing the escapement of summer Chinook passing Ice Harbor Dam, which is the first dam on the Snake River, to Bonneville which is the first dam on the Columbia River. The impact of the most recent three dams on the Snake River, Lower Monumental (1969), Little Goose (1970), and Lower Granite (1975), is dramatically illustrated by comparing the ratios for 1968 and 1969 with 1975 and 1976. These ratios reflect the percent of summer Chinook successfully passing the first dam on the Snake River (Ice Harbor) with

reference to those clearing Bonneville Dam.

1968 - 35.6%	1975 - 17.4%
1969 - 30.3%	1976 - 14.5%

The greatest single impact upon the return of fish to the Snake River in Idaho, other than natural weather conditions, is the United States' construction and operation of the dams on the River and the controls exercised on flows and spills. How can there be an adjudication and delivery of fish to Idaho without the joinder the major actor?

This Court held in Texas v. New Mexico, 352 U.S. 991 (1957) that the United States' responsibility to its Indian wards is an interest which makes the United States an indispensable party when such Indian interests are affected. On the Columbia River, there is a decree by the United States District Court for Oregon Sohappy v. Smith, 302 F. Sup. 899, 529 F. 2d 570, which has apportioned the Columbia River fishery between four treaty tribes and non-Indian fishermen. The Special

Master recognized that an apportionment of fish between Idaho and downstream fishermen would effect the Indian harvest.

> "Increased escapement at Bonneville will not assure than an increased number of fish will reach Idaho.[1] More fish will be available for Indian harvest and, in the absence of the United States and the tribes, no control may be exercised over the Indian harvest. The benefit to Idaho is uncertain, but the detriment to non-Indian commercial fishing below Bonneville is apparent. An adequate decree should recognize, assure, and protect all

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[1] In Washington v. Oregon, 297 U.S. 517 (1936), this Court recognized the phenomena of transportation loss and considered that loss in denying relief to Washington. In that situation, if the water was not diverted for use in the State of Oregon, then in all likelihood the water would be lost in the deep gravel channel of the river, and thus would not be available during the dry season for use in Washington. (Supra at 529) In the present situation, a substantial portion of fish clearing Bonneville Dam do not survive the upstream migration to Idaho.

> interrelated rights. It cannot do so unless all effected parties are bound." (Footnote added) (Rpt. 20)

Either the additional fish decreed for Idaho would be subject to the Indian fishery or the Indian fish entitlement would be decreased. If there is an increase in the Indian harvest, then the United States is indispensable to fashion appropriate relief so that Idaho would enjoy the benefits of a favorable decree or, conversely, if the Indian entitlement is to be redefined, then the United States in indispensable for the adjudication of such Indian rights. In either situation, the United States is indispensable. (See: Wash. Brief of February 24, 1978, p. 12, et seq.; Special Masters Report, p. 17, et seq.)

IV.

CONCLUSION

Idaho's most recent exceptions of May, 1979, have, like this brief,

not added any new considerations[2] not previously expressed in briefs filed with the Special Master and with this Court. Idaho's basic thesis is that whenever a "problem" is perceived to exist, a judicial remedy must be made available. Justice Aldisert of the 3rd Circuit Court of Appeals recently

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2 The possible exception being the contention that the United States does not enjoy sovereign immunity. However, as recently as February 22, 1979, this Court again recognized that the United States does have sovereign immunity in original actions between states. California v. Arizona, 59 L. ed 2d. 144. A law review article cited by the plaintiff, 20 Hastings L.S. 1 (1968) observed at p. 2, fn 4:

> "Thus, the United States may sue states in the original jurisdiction. Authorities cited Note 1, supra. The states, however, may not sue the United States without its consent. e.g. Louisiana v. McAdoo, 234 U.S. 627, 628-29 (1914); Kansas v. United States, 204 U.S. 331, 343 (1907); Oregon v. Hitchcock, 202 U.S. 60, 70 (1906)."

expressed some comments with reference to that thesis in his article in 38 University of Pittsburgh Law Review, 437 (1977) "The Role of the Courts in Contemporary Society", as follows:

> "While I cheerfully concede that many concrete disputes qualify as explosive societal issues, I believe a distinction can -and must-be drawn between a dispute, which belongs in a court, and a problem, which does not." (Supra 472)
>
> "The reality of legislative and administrative solutions to problems is that they may be tentative, experimental and susceptible to change. By contrast, judicial solutions, couched in terms of constitutional rule, 'move much more in the realm of the absolute.'" (Supra 473)

As the Special Master recognized in the instant proceeding, "the preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and

philosophical conflicts not solvable by judicial action." (Rpt. 24)

We respectfully submit that the Special Master's Report should be adopted by the Court and this action be dismissed.

DATED this 31st day of May, 1979.

Respectfully submitted,

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Attorney General

EDWARD B. MACKIE
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Attorneys for Defendant State of Washington

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 1979, three copies of Defendant State of Washington's Response to Plaintiff's Exceptions were mailed, postage paid, to:

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 67, Original

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF IDAHO EX REL. JOHN V. EVANS, GOVERNOR, ET AL., PLAINTIFFS

v.

STATE OF OREGON AND STATE OF WASHINGTON

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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v.

STATE OF OREGON AND STATE OF WASHINGTON

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of March 5, 1979.

On December 7, 1976, the Court granted Idaho leave to file its original complaint against the States of Oregon and Washington insofar as it sought a determination of that State's "equitable portion of the upriver anadromous fishery of the Columbia River Basin." 429 U.S. 163, 164. However, the Court expressly left two matters open: (1) whether "the bill of complaint * * * states a claim upon which relief may be granted"; and (2) "the question of the indispensability of the United States as a party * * *, in the event the United States does not enter its appearance in the case." *Ibid.* After the defendants filed their answers, the case was referred to a Special Master. 431 U.S. 952 (1977). The Master conducted hearings and has now submitted his report to

the Court, which sufficiently recites the relevant facts. Report, at 6-11. We fully accept each of the Master's principal conclusions.

1. Although finding that "[t]he complaint states a justiciable controversy proper for the Court to consider and determine in the exercise of its original jurisdiction" (Report, at 17), the Master repeatedly indicates his view that, if at all possible, the controversy ought to be resolved elsewhere than in this Court. Thus, the Report stresses that "[a]ny decree in this case for an apportionment will require constant supervision and the exercise of continuing jurisdiction" (*id.* at 21); it adverts to the need to appoint a "fish-master", whose decisions "will have nothing to do with the Court's performance of its Article III judicial functions" (*ibid.*); and it notes that the case involves "complex and interrelated environmental, social, economic, legal, political and philosphical conflicts not solvable by judicial action" (*id.* at 24). The Master comments on "the undesirability, if not impropriety, of the Court's undertaking continued regulation of the Columbia River fishery" (*id.* at 22), and he concludes that "[t]he answers to all the conflicts presented is mutual accomodation and expert administration, not litigation" (*id.* at 24). See, also, *id.* at 20-22, 28-29. Nevertheless, in the final words of the Supplemental Report, the Master recommends that the dismissal of the action—required because the United States is an indispensable party and declines to intervene—should be "without prejudice to the right of Idaho to refile at some later date if Idaho is wholly unable to obtain a remedy through agreement" (*id.* at 31).

In sum, quite independently of his conclusion that the suit must be dismissed on the ground of the indispensability of the United States as a party, the Special Master entertains doubts about the ap-

propriateness of burdening any court, especially this Court, with the continuing responsibility for equitably apportioning the fishery and clearly prefers a negotiated settlement. Yet, the Master is sensitive to the claims of Idaho, as the State that "produces many fish and receives few" (Report, at 10), and he is accordingly reluctant finally to shut the courthouse door if all other avenues of relief prove unavailing. We entirely agree.

A Court seized of the record in *Washington* v. *United States*, No. 78-119 and companion cases, need not be reminded of the recurring legal and practical problems involved in apportioning a migratory fishery. In this case, moreover, the Court must feel some reluctance in effectively abrogating an agreed and judicially approved fishery plan for the Columbia River, which was executed only after more than eight years of litigation and still has almost three years to run. See Oregon Motion to Dismiss, App. A; Report, at 12-13.[1] And, finally, it is not clear that permitting the action to go forward would not implicate the operation of the several Columbia and Snake River dams by the United States, as well as its management of the anadromous fishery beyond the three-mile limit, both matters involving complex policy decisions not readily susceptible to judicial review.

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[1]Although the Special Master concluded that the pendency in the District Court for Oregon of *Sohappy* v. *Smith* and *United States* v. *Oregon* was not a bar to the present action (Report, at 4, 11, 29), he did not suggest that the Plan approved in that litigation could survive this suit. The present complaint seeks substantially to increase the escapement into Idaho of returning salmon and steelhead. If that prayer succeeds, the premise of the allocation between the States and the Tribes party to the Oregon Plan is undermined and the agreement is presumably vitiated. Nor does Idaho's undertaking to assert its claim only against the non-Indian share of the fishery save the Plan. Oregon and Washington are entitled to object and predictably would do so.

These considerations have persuaded us not to sanction the present proceeding by intervention. The same concerns, we submit, would justify the Court in dismissing the suit at this time even if there were no jurisdictional obstacle. Cf. *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). On the other hand, we believe Idaho ought not be foreclosed indefinitely from all relief. Our own belated efforts to secure an amicable solution thus far have not succeeded. But, we do not despair that more time will permit an accomodation to be reached. Obviously, the Court may supply a goad to that end if it follows that Master's recommendation and expressly reserves Idaho's right to refile after dismissal of the present complaint in the event no agreement is forthcoming. At all events, the United States will continue to cooperate with all concerned groups with a view to reaching a negotiated settlement of the dispute.

2. As we have indicated, the Special Master concluded that the United States is an indispensable party to this action and that, in the absence of intervention, the case must therefore be dismissed. The Report finds that no decree can be effective which does not adjudicate "[t]he rights and obligations of the United States, both as trustee of the Indians [who enjoy federal treaty fishing rights on the Columbia River] and as proprietor of the facilities [some eight hydro-electric dams] utilizing the waters of the [Columbia River] System" (Report, at 24). In our view, that is plainly correct. See *Texas* v. *New Mexico*, 352 U.S. 991 (1957); *Arizona* v. *California*, 298 U.S. 571-572, (1935).

Of course, as the Court itself noted here (429 U.S. at 164), the obstacle may be overcome by the intervention of the United States. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 551 (1963). We have

accordingly considered, and reconsidered, taking that step. See Report, at 17, 26-27. But, for the reasons just stated, among others, we have concluded against intervention at this time.[2]

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[2]Presumably, this Court need not assess the "wisdom" of the government's decision not to intervene. But see *California* v. *Arizona*, No. 78, Original (February 22, 1979), slip op. 4. We nevertheless volunteer the information that—besides the considerations recited above—our reluctance to intervene is influenced by a concern not to prejudice the presently recognized fishing rights of four Indian Tribes, parties to the Columbia River Fisheries Plan already mentioned. Unfortunately, Idaho's insistence that it does not seek to disturb the present apportionment in favor of those Tribes does not bind the defendant States, who may reasonably argue that the consequence of any increased Idaho share of the fishery must be borne by *all* fishermen of the Columbia River, including the Indians. See note 1, *supra*.

On the other hand, we owe a conflicting duty to protect the rights of the Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho, who traditionally fish on a fork of the Salmon River. See Report, at 26-27. At the present time, however, we are not persuaded that the rights of the latter Tribes cannot be secured by means other than this suit.

3. Having joined the Special Master in his major conclusions, we support his ultimate recommendation: that this action be dismissed, but without prejudice to the right to refile if Idaho is wholly unable to obtain relief by other means.

Respectfully submitted.

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APRIL 1979

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MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

No. 67, Original

State of Idaho, ex rel. JOHN V. EVANS, Governor;
DAVID H. LEROY, Attorney General;
JOSEPH C. GREENLEY, Director, Department of Fish and Game,
Plaintiff,

v.

STATE OF OREGON, STATE OF WASHINGTON,
Defendants

PLAINTIFF'S REPLY TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

In the present proceeding the Special Master has recommended the dismissal of Idaho's complaint for failure to join the United States as an indispensable party. The Master suggests such dismissal be without prejudice to Idaho's right to refile if unable to obtain relief through mutual accord. Master's Report, 31. At the Court's invitation, the United States filed a memorandum as amicus curiae endorsing the Master's findings of fact and principal conclusions. United States' Memorandum, 1-2. The defendant states of Oregon and Washington failed to submit exceptions to the Master's Report.

Idaho submits the following reply to the Memorandum of the United States. This reply focuses upon the assertions of the United States that the issues presented are unduly complex and will burden the Court. Plaintiff's exceptions previously filed with this Court regarding the alleged indispensability and sovereign immunity of the United States sufficiently rebut the assertions of the Department of Justice.[1]

I.

THE MASTER'S DETERMINATIONS ARE SUPPORTIVE OF IDAHO'S CLAIM TO EQUITABLE APPORTIONMENT

Contrary to the assertions of the Department of Justice (Memorandum, 2), the findings of the Special Master are

[1]Contrary to the assertion of the Department of Justice that ". . . this Court need not assess the 'wisdom' of the government's decision not to intervene," (U.S. Memorandum, 5, fn. 2), Idaho asserts that this Court must analyze the basis for the government's position when the concept of sovereign immunity is relied upon. In fact, an analysis of the widsom of the government's decision reveals that there is no basis to support the alleged sovereign immunity.

supportive of Idaho's position. In fact, the Master's Report is favorable to Idaho's position on many significant points. Most importantly, the Master specifically found that Idaho subsidizes the downstream fisheries and, as a result, receives but few of the many fish it produces. Master's Report, 10, 11.

This basic inequity to Idaho stands in contrast to the position of the Department of Justice that the courthouse doors should be shut to Idaho. While the United States attempts to soften the denial of judicial relief to Idaho by asserting that the dismissal is without prejudice, the fact remains that relief is being denied to a meritorious claim.

II.

AMICUS CURIAE HAS GROSSLY OVERSTATED THE COMPLEXITY OF THE ISSUES PRESENTED IN THIS CASE

The Memorandum of the Department of Justice seeks to magnify the complexity of the issues presented for review in an apparent attempt to frighten the Court into refusing this litigation. However, a look at the legal issues presented establishes the simplicity of Idaho's claim. Idaho seeks only judicial recognition of its right to an equitable apportionment of anadromous fish.

Any complexities that may arise in this case are secondary to recognition of the equitable rights of Idaho. The complexities cited by amicus curiae simply do not go beyond this Court's performance of its article III judicial functions.

The government bases its position on the assertion that federal operation of the dams and management of the ocean

fishery involve complex policy decisions not "readily susceptible to judicial review." Id, 3. The United States overlooks the fact that policy in both areas is controlled by federal statutes which strongly favor the position of the State of Idaho. Further, the United States exercises no control over regulatory allocations in the Columbia River.[2] Accordingly, the United States plays no role in the issue presently before the Court and should not be considered a necessary party.

Finally, "such [consideration of factual complexity is] hardly relevant to the exercise of this Court's original and exclusive jurisdiction." *California* v. *Arizona*, 59 L. Ed. 2d 144, 152 (1979) at n. 8. Because this Court is the highest Court in the nation, it has the unenviable responsibility of resolving complex disputes. A dismissal in this case only delays the ultimate resolution, it does not remove the legal issues.

III.

CONTRARY TO THE ASSERTIONS OF THE AMICUS CURIAE, NO NEED FOR CONTINUING JURISDICTION HAS BEEN SHOWN

The Special Master found that any decreed apportionment in this case will require daily supervision and concluded that such decree will require the exercise of continuing jurisdiction. Master's Report, 20-21. Idaho objects to that conclusion, and its endorsement by the government, because such determination is premature and should await

[2]Record, 221; Exhibit W-4 at Q-1.

full presentation of evidence on the merits. Only after a full hearing can this Court determine whether daily supervision is necessary.

Obviously, management of the anadromous fishery resource of the Columbia Basin is a complex science not subject to ultimate precision. Idaho does not dispute that the equities of production will vary to some degree following trial. Yet, this Court has stated that difficulties of drafting and enforcing a decree do not obviate its vested constitutional function.[3]

Idaho submits that, where appropriate, the Court has retained jurisdiction, allowing the parties to later apply for modification or enforcement of a decree.[4] Consequently, Idaho submits that retained jurisdiction is a feasible alternative which should not be negated until full hearing on the merits.

IV.

RESOLUTION OF THE CONFLICT THROUGH MUTUAL ACCOMMODATION WILL BE ENCOURAGED BY JUDICIAL RECOGNITION OF IDAHO'S EQUITABLE RIGHTS

The Special Master ultimately concluded that the desirable resolution of the pending conflict rests in mutual accommodation and expert administration, rather than liti-

[3]*Nebraska* v. *Wyoming*, 325 U.S. 509, 616 (1945).

[4]The Supreme Court retained jurisdiction over: *Wisconsin* v. *Illinois*, 281 U.S. 696 (1930); *New Jersey* v. *New York*, 283 U.S. 336 (1931); *Wyoming* v. *Colorado, 259 U.S. 419 (1922)*; *Nebraska* v. *Wyoming*, 325 U.S. 509 (1945); *Arizona* v. *California*, 373 U.S. 546 (1963).

gation. Master's Report, 24. The government has heartily endorsed that finding. Memorandum, 3, 4.

This position is contrary to the findings of the Master that this controversy has been going on for years, that Idaho has been rebuffed in efforts to join the Columbia River Fish Compact, and that Idaho as a non-party may not compel adherence to the *Sohappy* settlement agreement. Master's Report, 5, 6, 13.

It is the lack of mutual accommodation which brought Idaho before this Court as its only available forum. Dismissal without prejudice will do nothing to supply the needed accord suggested by the Master. Such dismissal will not ". . . supply a goad to that end . . ." as the government envisions. Memorandum, 4. Continued cooperation by the United States in aiding the parties toward settlement is offered (Id., 4), but will fail to produce compromise given the attitudes of the defendants. In fact, it will be extremely difficult for Idaho, while laboring under dismissal without prejudice, to obtain even the minimal relief which the government failed to obtain from the defendants and the tribes under threat of intervention.[5] Only through strong judicial initiative can this action be resolved quickly and without undue complexity.

CONCLUSION

Because Oregon and Washington did not lodge briefs with the Court regarding their respective position, Idaho has limited its reply to only a rebuttal of the federal contentions asserted in the United States' Memorandum. Relying

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[5]See Plaintiff's Exceptions, Appendix C.

upon the exceptions filed on May 2, 1979, and the above reply to the United States, Idaho urges this Court to determine that the United States is unnecessary to adjudication of the pending litigation. Accordingly, this Court should overrule the Master's conclusion of indispensability and recommendation of dismissal without prejudice, thereby allowing Idaho to adjudicate this crucial issue at the present time.

DATED this 31st day of May, 1979.

DAVID H. LEROY
ATTORNEY GENERAL
STATE OF IDAHO

W. HUGH O'RIORDAN
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CHIEF, NATURAL RESOURCES
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 1979, three copies of PLAINTIFF'S REPLY TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE were mailed, postage prepaid, to:

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and further that all parties required to be served were served.

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